FILED
MAR 7 1980

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1344

MICHAEL M.
Petitioner,

VS.

THE SUPERIOR COURT OF SONOMA COUNTY,
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of California

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Dated: February 27, 1980

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Petitioner, Michael M., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of California which was entered in this proceeding on November 5, 1979.

OPINION BELOW

The opinion of the Supreme Court of California is reported at 25 Cal.3d 608 and at 601 P.2d 572. The opinion is printed in the Appendix at page A-1.

JURISDICTION

The decision of the Supreme Court of California was entered on November 5, 1979. A Petition for Rehearing was denied on December 5, 1979.[1] This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Whether the prosecution of petitioner, age 17, under California's statutory rape law (Penal Code §§ 261.5, 264) for engaging in sexual intercourse with a sixteen year old female violates petitioner's right to equal protection of the law as guaranteed under paragraph 1 of the Fourteenth Amendment of the United States Constitution where the female can commit no crime under the statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Penal Code § 261.5:

Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.

California Penal Code § 264 (effective until January 1, 1980):

Rape, as defined in Section 261, is punishable by imprisonment in the state prison for three, six, or eight years. *Unlawful sexual intercourse, as defined in Section 261.5, is punishable either by imprisonment in the county jail for not more than one year or in the state prison,* and in such case the jury shall recommend by their verdict whether the

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[1]The minute order denying the Petition for Rehearing is printed in the Appendix at page A-25.

punishment shall be by imprisonment in the county jail or in the state prison, provided, that when the defendant pleads guilty to an offense under Section 261.5, the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison. (emphasis supplied)

California Penal Code § 264 (operative January 1, 1980):

Rape, as defined in Section 261, is punishable by imprisonment in the state prison for three, six, or eight years. Rape as defined in Section 262, is punishable either by imprisonment in the county jail for not more than one year or in the state prison for three, six, or eight years. *Unlawful sexual intercourse, as defined in Section 261.5, is punishable either by imprisonment in the county jail for not more than one year or in the state prison,* and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail for not more than one year or in the state prison, and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison; provided, that when the defendant pleads guilty to an offense under Section 261.5 the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison. (emphasis supplied)

Section 1 of the Fourteenth Amendment of the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE[2]

A one count Information was filed in the Sonoma County Superior Court on June 27, 1978. The Information alleged that Petitioner "accomplished" an act of sexual intercourse with a 16 year old female in violation of California Penal Code Section 261.5. On July 27, 1978, Petitioner was arraigned on the Information. At that time, Petitioner moved to dismiss the Information on the ground that Penal Code Section 261.5 is unconstitutional in that it violates the equal protection clauses of both the United States and California Constitutions. This motion was denied on August 22, 1978.

On September 6, 1978, a Petition for Writ of Prohibition was filed in the California Court of Appeal, First Appellate District, requesting that the Sonoma County Superior Court be compelled to grant the motion to dismiss. Although the Court of Appeal denied the Writ on September 14, 1978, the Supreme Court of California ordered the Petition transferred to it on October 12, 1978. On October 17, 1978, the Supreme Court of California issued an alternative Writ of Mandate ordering the Sonoma County Superior Court to show cause why it should not be compelled to dismiss the Information.

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[2]The material facts set forth were admitted in the pleadings filed in the Supreme Court of California.

On November 5, 1979, the Supreme Court of California denied the Writ of Mandate by a narrow majority. Petitioner's Petition for Rehearing was filed on November 19, 1979, and was denied on December 5, 1979.

REASONS FOR GRANTING THE WRIT

Introduction

The Petitioner, Michael, stands before this Court accused of participating in sexual intercourse with Sharon, a sixteen year old female. Michael was seventeen years old at the time of the alleged offense, only one year and 18 days older than Sharon. Under the statute challenged, Sharon has committed no crime while Michael faces the prospect of a felony prison sentence. Michael has questioned this disparate treatment of males and females on equal protection grounds.

In upholding the constitutional validity of California Penal Code Section 261.5 (hereinafter "the statute"), the Supreme Court of California has acknowledged that the statute classifies and discriminates on the basis of sex. The Court justified the discriminatory classification scheme of the statute on the ground that it furthered the State's "compelling interest" in preventing teenage pregnancies. *Michael M. v. Superior Court*, 25 Cal.3d 608, 611, 601 P.2d 572, 574 [Appendix p.A-2]. No justification other than pregnancy prevention has been offered.

It is obvious that the statute discriminates against males. Males face prison sentences for conduct which females engage in with impunity. On closer examination, it is equally apparent that the statutory classification scheme is based upon the outdated stereotype of male supremacy. The

statute challenged is therefore inherently and impermissibly discriminatory to both sexes.

The opinion of the majority of the California Supreme Court is replete with provincial assumptions and inherent sexual prejudices. The majority opinion finds that males are more culpable than females for engaging in non-marital sex. The Court further concludes that contraceptives are of doubtful value in preventing pregnancy. The opinion attempts to confirm inveterate sexual conventions at a time when the courts should be acting to eradicate arrant sexual stereotypes. See *Orr v. Orr*, 440 U.S. 268, 59 L.Ed.2d 306, 99 S.Ct. 1102. *Craig v. Boren*, 429 U.S. 190, 50 L.Ed.2d 397, 97 S.Ct. 451. *Frontiero v. Richardson*, 411 U.S. 677, 684-685, 36 L.Ed.2d 583, 590, 93 S.Ct. 1764. *Reed v. Reed*, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251. This Court should therefore consider the questions presented by this case and dispel the erroneous stereotypes held by the Supreme Court of California.

I

THE OPINION BELOW JUSTIFIES AND PROMOTES UNEQUAL TREATMENT OF THE SEXES UNDER THE LAW AND IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT ON SEX DISCRIMINATION

California's statutory rape law creates an arbitrary irrebutable presumption of male culpability. The statute blames the male even though the female may be older, more mature, or herself the sexual aggressor. The consequences of application of the statute may be completely inequitable. In *State v. Snow* (Mo. 1923), 252 S.W. 629,

632, the Missouri Supreme Court noted the fundamental unfairness of that State's statutory rape law as applied to the record before it:

> This wretched girl was young in years but old in sin and shame. A number of callow youths, of otherwise blameless lives so far as this record shows, fell under her seductive influence. They flocked about her . . . like moths about the flame of a lighted candle and probably with the same result. The girl was a common prostitute . . . The boys were immature and doubtless more sinned against than sinning . . . Why should the boys, misled by her be sacrificed? What sound public policy can be subserved by branding them as felons? . . .

By exclusively holding males criminally liable for consensual teenage sex, the statute creates an arbitrary burden on the rights of males. The arbitrary use of sex as a criteria, however, is not constitutionally permissible. *Reed v. Reed, supra.*

The majority below assumes that pregnancy is similar to a disease which is carried by males who, like "Typhoid Mary", infect others while never contracting the disease themselves. According to the majority, "[t]he Legislature is well within its power in imposing criminal sanctions against males, alone, because they are the *only* persons who may physiologically cause the result which the law properly seeks to avoid." *Michael M.,* supra, 25 Cal.3d 608, 612 [Appendix p.A-5] (emphasis the Court's). Of course, males are not the *only* persons who cause pregnancy. The joint action of *both* a male and a female is ordinarily required. The Court's distortion of this physiological fact is a futile attempt to cling to the stereo-

types embodied in the statute. The Court's opinion is not grounded in medical or legal fact, and should not stand as a statement of Constitutional Law.

The reasoning of the majority below presumes that females as a class are susceptible and therefore need to be defended. The dissent of Justice Mosk aptly criticizes the majority's irrebutable presumption of diminished capability of the female:

> *Because she is a woman* she is deemed inherently less capable of knowing the facts, of controlling her emotions, of weighing the risks and benefits, and of making intelligent choices—in short, she is less responsible for her actions—than her male counterpart. As it presently reads, the California statutory rape law thus reflects a belief that the minor female is in need of special protection not only against the male but also against herself, against her "voluntary" but presumptively imprudent decisions in matters of sex.
>
> Michael M., *supra,*
> 25 Cal.3d 608, 624,
> [Appendix p.A-22, 23]
> (emphasis the court's)

The Court's opinion detracts from the status and the rights of women in the guise of their protection. Although the courts of the past have endorsed this kind of "romantic paternalism",[3] there is no justification for prolong-

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[3]See, for example, *Muller v. Oregon* (1908), 208 U.S. 412, 421-422, 52 L.Ed. 551, 556, 28 S.Ct. 324, in which it was stated: "[H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength . . . [H]er physical structure and a proper discharge of the maternal functions—having in view not merely her own health, but the well-being of the entire race—justified legislation to protect her from the greed and as well as the passion of man."

ing such antiquated notions. *Frontiero v. Richardson, supra,* 411 U.S. at 684-685. "The pedestal upon which women have been placed has all too often, upon closer examination, been revealed as a cage." *Sail'er Inn v. Kirby* (Cal. 1971), 5 Cal.3d 1, 20, 485 P.2d 529.

The Court's use of pregnancy prevention to justify the discriminatory operation of the statute perpetuates fixed notions about the sexes. The fact that only females become pregnant has been traditionally used a rationalization for sex discrimination. "Certainly the fact that women and not men bear children is a fundamental distinguishing characteristic of the two sexes and as such can be the basis for some gender based legislation; but there is a danger that the very uniqueness of this characteristic makes it an available hindsight catchall rationalization for laws promulgated with totally different purposes in mind." *Meloon v. Helgemoe* (1st Cir., 1977) 564 F.2d 602, 607, cert. denied, 436 U.S. 950, 56 L.Ed.2d 793, 98 S.Ct. 2858.

The Court disputes universally accepted facts in an attempt to rationalize its defense of traditional sex roles. For example, the use of contraceptives was rejected as a defense due to "doubtful efficacy"; "[W]e believe legislators' rejection of the defenses suggested . . . reflect[s] their reluctance to rely, for accomplishment of their antipregnancy objective, upon the doubtful efficacy of contraceptives and the truth of the inevitable claim of nonemission by a male charged with statutory rape." *Michael M., supra,* 25 Cal.3d 608, 613 [Appendix p. A-6] (quoting *State v. Rundlett* (Maine 1978) 391 A.2d 815).

The majority's assumption that contraceptives are ineffective evidences an anachronistic perspective. As pointed out in the dissent of Justice Mosk, "certain pregnancy prevention devices (e.g., condoms and contraceptive pills) are both efficacious and widely available to 17 year old men and women. The majority's disregard of this well-known fact does not make it any less true." *Michael M., supra,* 25 Cal.3d 608, 620 n.3 [Appendix p.A-17]. The assertion that contraceptives are of "doubtful value" is also inconsistent with this Court's recognition of the importance of the right to use and acquire contraceptives. *Carey v. Population Services International,* 431 U.S. 678, 52 L.Ed.2d 675, 97 S.Ct. 2010. *Griswald v. Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678. The majority opinion is dangerously out of date and contrary to well known medical evidence.

The decision below is based upon assumptions about the roles of the sexes that should not be given judicial sanction. With few exceptions, equal protection requires that the law operate without regard to sex. "A gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny." *Orr v. Orr, supra,* 440 U.S. 268, 282-283. If anything, teenage girls are generally more mature than boys of like age and are therefore at least as responsible as their partners for voluntary sexual intercourse. The decision below which condones such unequal treatment should not be allowed to stand.

II

THE CONSTITUTIONAL VALIDITY OF STATUTORY RAPE LAWS IS A QUESTION OF NATIONAL IMPORTANCE WHICH SHOULD BE DECIDED BY THIS COURT

This Court's determination of the validity of the California statute will help to resolve questions that are certain to be raised in numerous federal Habeas Corpus proceedings as well as in state appellate courts. Statutory rape laws have been recently challenged in nine states[4] and twice in the First Circuit.[5] This pattern of litigation demonstrates that questions concerning the Constitutional validity of statutory rape laws have been the focus of numerous inquiries. The wave of challenges to the various statutory rape laws has been precipitated by the recent decisions of this Court in the realm of sex discrimination. See *State v. Rundlett,* 391 A.2d 815, 817-818, *In Re Interest of J.D.G.,* 498 S.W.2d 786, 793, *Meloon v. Helgemoe, supra,* 564 F.2d 602, 604. Unless this Court decides the issues presented by this case, the surge of challenges to the various statutory rape laws will continue. It is therefore imperative

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[4]*Michael M. v. Superior Court* (Cal. 1979), 25 Cal.3d 608, 601 P.2d 572, *Olson v. Nevada* (Nev. 1979), 588 P.2d 1018, *State v. Drake* (Iowa 1979), 219 N.W.2d 492, *People v. Fauntleroy* (N.Y. 1978), 405 N.Y.S.2d 931, *Ex Parte Groves* (Tex. 1978), 571 S.W.2d 888, *State v. Rundlett* (Maine 1978), 391 A.2d 815, *State v. Thompson* (N.J. 1978), 392 A.2d 678, *State v. Meloon* (N.H. 1976), 366 A.2d 1176, *In Re Interest of J.D.G.* (Mo. 1973), 498 S.W.2d 786.

[5]*Rundlett v. Oliver* (1st Cir., 1979), 607 F.2d 495, *Meloon v. Helgemoe* (1st Cir., 1977), 564 F.2d 602, cert. denied 436 U.S. 950.

that this Court grant certiorari to resolve these questions of national interest which continue to consume the time and attention of the lower courts.

CONCLUSION

The opinion of the majority is based upon the antiquated sexual myth of the superiority of the male. Such an opinion by the highest court of the most populous state can only help to perpetuate the notion that women are inferior to men, and prolong the struggle for equal rights among the sexes. Questions as to the validity of many forms of statutory rape laws have been raised in numerous courts throughout the nation. This Court should grant certiorari to give constitutional guidance on the issues presented herein.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of California.

Dated: February 27, 1980.

Respectfully submitted,
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(Appendix Follows)

APPENDIX

APPENDIX

[25 Cal.3d 608, 601 P.2d 572]

[S.F. No. 23929, Nov. 5, 1979.]

Michael M. Petitioner, v.
The Superior Court of Sonoma County, Respondent;
The People, Real Party in Interest.

Opinion

RICHARDSON, J.—We consider the constitutionality of Penal Code section 261.5 (all statutory references are to that code unless otherwise cited), which defines the offense of "unlawful sexual intercourse" as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." The crime was formerly called "statutory rape." We will conclude that while this section does classify both victims and offenders by sex, there is a compelling state interest which justifies the classifications, thus meeting the equal protection requirements of both federal and state Constitutions.

The factual and procedural aspects of the case are briefly described. Defendant, 17½ years old, and Sharon, 16, engaged in sexual intercourse after an amorous interlude on a park bench. There was some evidence that the defendant struck Sharon twice before she engaged in the act. After the juvenile court found that defendant was not a fit and proper subject to be dealt with under the juvenile court law (Welf. & Inst. Code, § 707, subd. (a)), he was charged by information with a felony violation of section 261.5. Following his unsuccessful motion to set aside the information under section 995, he seeks from us a writ of

prohibition to compel the respondent superior court to dismiss the information on the ground that section 261.5 violates the equal protection clauses of both the United States and California Constitutions, because only females are protected by the statute and only males may be prosecuted it under it. (§ 999a; (*Rockwell* v. *Superior Court* (1976) 18 Cal.3d 420, 427-428 [134 Cal.Rptr. 650, 556 P.2d 1101].) For reasons developed below we reject this contention.

In *Sail'er Inn, Inc.* v. *Kirby* (1971) 5 Cal.3d 1 [95 Cal. Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351], we considered the issue of suspect classifications based upon sex. Specifically, we there invalidated a statute which prohibited women from tending bar except in certain limited circumstances. Under the strict scrutiny standard routinely applied when the classification is deemed suspect, we imposed upon the state the burden of establishing not only that the state has a *compelling* interest which justifies the law but that those distinctions drawn by the law are necessary to further the statute's purposes. (*Id.*, at pp. 16-17; *Arp* v. *Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 406 [138 Cal.Rptr. 293, 563 P.2d 849]; *Westbrook* v. *Mihaly* (1970) 2 Cal.3d 765, 784-785 [87 Cal.Rptr. 839, 471 P.2d 487].)

There can be no doubt that section 261.5 discriminates on the basis of sex because only females may be victims, and only males may violate the section. However, this obviously discriminatory classfication scheme is readily justified by an important state interest. Unlike the sex-based classification which we invalidated in *Sail'er Inn,* and which reflected overbroad social generalizations regarding the appropriate roles of males and females, the law

herein challenged is supported not by mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant. This changeless physical law, coupled with the tragic human costs of illegitimate teenage pregnancies, generates a compelling and demonstrable state interest in minimizing both the number of such pregnancies and their disastrous consequences. Accordingly, the Legislature is amply justified in retaining its historic statutory rape law because of the potentially devastating social and economic results which may follow its violation.

Pregnancies among unwed teenage girls constitute a major contemporary human problem the dimensions of which may be illustrated by a few current statistics. Between 1971 and 1976, 83.6 percent of the 4,860 children born in California to girls under 15 years of age were illegitimate. During this same period, of the 112,682 children born to girls from 15 to 17 years of age, 51 percent were illegitimate. An average of 37.5 percent of births to all teenage mothers from 1971 to 1976 were out-of-wedlock. In contrast, approximately 15 percent of births to women of all ages during a comparable period were illegitimate. (Cal. Dept. of Health Services, Center for Health Statistics, Birth Cohort Records.) We may conclude that the problem of illegitimate births to teenagers is serious.

The fact that most teenage pregnancies are unwanted is evidenced by the fact that teenagers seek and utilize a disproportionate amount of abortion services. While teenagers accounted for 21 percent of all pregnancies in 1976, 48 percent terminated their pregnancies by induced abortion, thus accounting for 34.7 percent of all legal abortions

in California. (*Id.;* see also, Green & Potteiger, Teenage Pregnancy: A Major Problem for Minors (Zero Population Growth Pamp. 1977); 11 Million Teenagers (Alan Guttmacher Institute 1977).)

Furthermore, births to teenage mothers pose substantially increased medical risks as evidenced by the record of complications reported on the birth certificates in one-fourth of recent teenage pregnancies. (Cal. Dept. of Health Services, Center for Health Statistics, Birth Cohort Records, *supra.*) For both the adolescent mother and her infant there is a measurably greater risk of death, illness, or injury than for women in their 20s.

Finally, "The social consequences of teenage childbearing are even more pervasive than the health consequences. Thus, eight out of 10 women who first become mothers at age 17 or younger never complete high school—twice as high a proportion as those who do not give birth until they are 20 or older. A recent study clearly finds that the pregnancy directly causes the dropout, independent of any effect of antecedent education achievement or aptitude." (Lincoln, Is Pregnancy Good for Teenagers? (Alan Guttmacher Institute, U.S.A. Today, July 1978) pp. 34, 36.)

The injurious effects of pregnancy on an unwed teenager are thus substantial, far-reaching, and may well include severe physical, mental and emotional trauma. In our view a responsible Legislature need not blind itself to these serious sociological consequences. Understandably concerned about the scope of these problems it may, in an era of growing permissiveness, choose to meet them in a variety of ways. It may encourage sex education in schools

and provide for the dissemination of relevant educational information and medical attention in the manner described in Civil Code section 34.5. It may also, in our view, properly attack the problem more directly by expressly prohibiting acts of sexual intercourse performed by a male with a female, not the wife of the perpetrator, who is under the age of 18 years.

Once the state has established a valid and compelling interest in preventing pregnancies among unwed teenage girls and further determines to implement that interest, in part, by imposing a criminal sanction proscribing sexual relations with minor females, it inevitably follows that sex is the only possible and therefore *necessary* classification which can be adopted in identifying offender and victim. The Legislature is well within its power in imposing criminal sanctions against males, alone, because they are the *only* persons who may physiologically cause the result which the law properly seeks to avoid.

Defendant contends, however, that even if the prevention of pregnancy is a compelling state interest, the classification scheme of the statute is both overly broad and unnecessary to the protection of the female minor. He suggests that the state's interest in preventing pregnancy could be served equally well by removing from the ambit of the statute, either as female victims or male offenders, all those who use birth control devices or techniques and all those otherwise incapable of procreation. We disagree, adopting in this connection the sound reasoning of the Supreme Judicial Court of Maine in *State* v. *Rundlett* (Me. 1978) 391 A.2d 815, wherein, responding to a similar argument, it recently said, "We doubt that legislators, intent

on use of the criminal law to prevent juvenile pregnancies, would throw such a roadblock in the way of effective prosecution as would be created by subjecting an under-age prosecutrix to cross-examination of such additionally embarrassing and uncertain details. Furthermore, we believe legislators' rejection of the defenses suggested . . . reflect[s] their reluctance to rely, for accomplishment of their anti-pregnancy objective, upon the doubtful efficacy of contraceptives and the truth of the inevitable claim of non-emission by a male charged with statutory rape." (P. 821, fn. 18.)

We also are unable to accept the contrary argument that the statue is impermissibly *underinclusive* and must, in order to pass constitutional muster, be *broadened* so as to hold the female equally culpable. It is the prerogative, indeed the duty, of the Legislature to recognize degrees of culpability when drafting a Penal Code. It follows that the Legislature may reasonably conclude that the minor female who engages, however willingly, in sexual relations is subjected to risks and adverse consequences, both prenatal and postnatal, albeit of another kind, far greater than those which may befall her male counterpart. To hold otherwise defies not only common sense and reality, but the fundamental laws of biology.

We note that *all* minors, male and female, are protected from sexual abuse under sections 272 (contributing to the delinquency of a minor) and 288 (lewd and lascivious conduct upon the body of a child under 14). Women may be prosecuted under these statutes if they engage in sexual relations with underage males. (See *People* v. *Mackey* (1975) 46 Cal.App.3d 755, 760 [120 Cal.Rptr. 157].) Sec-

tion 261.5 merely provides additional protection for minor females in recognition of the demonstrably greater injury, physical and emotional, which they may suffer.

We find significance in the fact that in all of jurisprudence the only case upon which defendant can rely for his constitutional challenge is *Meloon* v. *Helgemoe* (1st Cir. 1977) 564 F.2d 602. But *Meloon,* as even the most cursory reading reveals, involved a statutory scheme under which it was declared to be a felony for a male to have consensual relations with a female under the age of 15, while it was not a crime *of any kind* for a woman to have consensual sexual relations with a male under 15. (P. 603.) It thus becomes apparent that the *Meloon* court was called upon to evaluate a statutory scheme quite different from that before us.

Furthermore, the Legislature may well have believed that the criminal prosecution of a minor female equally with a male would, as a practical matter, effectively eliminate any possibility whatever of prosecution under the statute. A potential prosecutrix, or her family, would be unlikely ever to complain if she would herself be subject to a prosecution on identical charges. Because the Legislature has enacted this legislation with the principal objective of protecting minor females as a class it is not surprising that it simultaneously elected to exclude the victim herself from the statutory proscription.

We emphatically reject defendant's contention that to uphold the constitutionality of section 261.5 necessarily creates adverse inferences concerning the capacity of minor females to make intelligent and volitional decisions. By its

adoption of section 261.5 the Legislature necessarily acknowledged the obvious truism that minor females are fully capable of freely and voluntarily consenting to sexual relations. If this was not so, the charge brought in these cases would uniformly be one of forcible rape. (§ 261.) The statute makes no statement about the girl's ability to consent. Rather, the statute merely prohibits the act of sexual intercourse with an underage female not the wife of the perpetrator rejecting consent as a defense. In this regard section 261.5 is no different than a variety of other statutes which prohibit minors from engaging in certain activities of much less consequence to the minor, no matter how well informed, how knowledgeable and how willing or consenting the minor might be. (E.g., §§ 308 [selling or furnishing tobacco to minor], 310 [minor under 16 may not attend prizefight], 326.5 [no minor may participate in bingo game].)

It is quite possible that the Legislature, if it so elected, could adopt a gender-neutral statute prohibiting sexual relations with minors of *either* sex, or it might, in some other way, modify the present statute in accordance with defendant's urgings. However, the Legislature is not constitutionally compelled to do so, and thus far for reasons satisfying to itself has not done so. Furthermore, we note that in all of those states which assertedly have adopted a neutral rule, the change was effected in every instance by *legislative action.* Not a single state has adopted such a rule by *judicial* decree.

The petition for writ of prohibition is denied.

Bird, C.J., Clark, J., and Manuel, J., concurred.

MOSK, J.—I dissent.

I cannot subscribe to the implied premise of the majority that the female of the human species is weak, inferior, and in need of paternalistic protection from the state. That concept is an anachronism in a society in which females have achieved remarkable progress toward equality. The tutelary syndrome of Victorian days has yielded to a new era in which women are contributing their talents in every field of endeavor—as prime ministers, governors, legislators, judges, corporate executives, lawyers, scientists, medical doctors, police officers, and professional athletes.

In this modern context, I conclude that Penal Code section 261.5, which defines "unlawful sexual intercourse" as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years," creates a classification by sex that is impermissible under our decision in *Sail'er Inn* v. *Kirby* (1971) 5 Cal.3d 1 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R. 3d 351], and violates the equal protection guarantee of article I, section 7, subdivision (a), of the California Constitution.

The majority gloss quickly over the facts of this case. Yet they illustrate once again the fundamental unfairness of a law that always punishes the young man and never the young woman for a joint act of which she was often equally the cause.

At the time of the incident the defendant herein, Michael, was 17½ years old; the so-called "victim," Sharon was only 1 year and 18 days younger than he. On the evening in question, Sharon and her 21-year-old sister bought half

a pint of whiskey and 2 Pepsi-Colas to use as mixers. After making this purchase they walked to a bus stop; Michael and two other male youths rode by on their bicycles, then returned and asked the girls if they would like to drink some wine. The girls replied affirmatively, and accompanied the boys to the railroad tracks. The group drank while walking to the tracks, and continued to do so on arrival. Sharon and Michael then went into the bushes, lay down, and began kissing and hugging for half an hour. They were interrupted by Sharon's sister, who asked Sharon if she was ready to leave. Sharon replied that she was not, and her sister left with one of the other boys. With remarkable impartiality, and on her own initiative, Sharon then began kissing the third boy. After he too departed, Sharon and Michael went to a park, lay down on a bench, and resumed their sexual activities. In due course Michael told Sharon to remove her pants, and when at first she demurred he allegedly struck her twice. Sharon testified she then said to herself, "Forget it," and decided to let him do as he wished. The couple then had intercourse.

I

Defendant contends that Penal Code section 261.5 denies him equal protection of the laws under the California Constitution. The majority concede, as they must, that the statute discriminates on the basis of sex because it punishes males who engage in consensual sexual intercourse with females under the age of 18, but not females who perform the same act with males under the age of 18. Accordingly, as the majority further concede, we must carefully scrutinize section 261.5 to determine whether the governmental

interest it serves is sufficiently compelling to justify it under the equal protection clause. This determination requires us to examine not only the nature of the interest sought to be promoted, but also the extent to which the statute is narrowly tailored to achieve that objective. (*Sail'er Inn, Inc.* v. *Kirby* (1971) *supra,* 5 Cal.3d at pp. 16-17; *Arp* v. *Workers' Comp. Appeals Bd.* (1977) 19 Cal. 3d 395, 406 [138 Cal.Rptr. 293, 563 P.2d 849].)

The Attorney General proposes, and the majority adopt his suggestion, that a general governmental interest in reducing pregnancies among unwed teenage girls be invoked to justify the sexual discrimination of section 261.5. In support the majority recite the obvious—that only females can conceive and bear children—and rely on studies showing that illegitimate teenage pregnancies are a significant medical and social problem today.

I do not underestimate the dimensions of that problem. But in analyzing suspect sexual classifications we must not be misled by appearances: we must determine whether the justification asserted for upholding the statute can legitimately be identified as among its actual purposes, or whether instead the classification is in fact a product of traditional sexual stereotypes and hence conflicts with the equal protection clause. (*Arp, supra,* at pp. 404-406 of 19 Cal.3d.) As Justice Richardson explained for a unanimous court in *Arp* (*id.* at p. 404), "We do not feel compelled to accept without inquiry 'the mere recitation of a benign, compensatory purpose,' particularly when that purpose is 'not at all self-evident' and in fact seems historically improbable," quoting *Weinberger* v. *Wiesenfeld* (1975) 420

U.S. 636, 648 [43 L.Ed.2d 514, 525, 95 S.Ct. 1225], and *Craig* v. *Boren* (1976) 429 U.S. 190, 199, footnote 7 [50 L.Ed.2d 397, 408, 97 S.Ct. 451.] This is because the mere recitation of a benign purpose "is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." (Fn. omitted; *Weinberger, supra*, at p. 648 of 420 U.S. [43 L.Ed.2d at p. 525].)

Neither the Attorney General nor the majority offer any support for their theory that the prevention of pregnancy is or even was among the purposes of section 261.5, and both the history and wording of the staute lead to a contrary conclusion. As presently codified the section proscribes the conduct commonly referred to as statutory rape. The modern prohibition against this conduct dates back to the Statutes of Westminster enacted during the reign of Edward I at the close of the 13th century. (3 Edw. 1, ch. 13 (1275); 13 Edw. 1, ch. 34 (1285); see 4 Blackstone, Commentaries 212.) The age of consent at that time was 12 years, and in 1576 it was reduced by statute to 10. (18 Eliz. 1, ch. 7, § 4.) The latter statute was held to be part of the common law of England that was brought to the United States. (Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape* (1965) 64 Mich.L. Rev. 105, 110.) Its purpose was simply to prohibit sexual intercourse with the underage female because she was believed to be "too young to understand the nature and quality of her act" (*ibid.*) and hence incapable of intelligently consenting thereto. The common law is devoid of any evidence that statutory rape law was intended to prevent such females from becoming pregnant.

Statutory rape law in California had its origin in a provision of our first penal statute (Stats. 1850, ch. 99, § 47, p. 234), subsequently reenacted as section 261, subdivision 1, of the Penal Code of 1872. These early statutes proscribed sexual intercourse with females under the age of 10, thereby following the English statute of 1576. In 1889, the California statute was amended to make the age 14. (Stats. 1889, ch. 191, § 1, p. 223.) In 1897, the age was advanced to 16. (Stats. 1897, ch. 139, § 1, p. 201.) And in 1913 it was fixed at 18, where it now remains. (Stats. 1913, ch. 122, §1, p. 212.)

In light of its origins surely it is at least "historically improbable" (*Arp, supra,* at p. 404 of 19 Cal.3d) that the purpose of the statute was prevention of pregnancy. As first enacted, the statute made punishable "Every person of the age of fourteen years and upwards, who shall have carnal knowledge of any female child under the age of ten years, either with or without her consent" (Stats. 1850, ch. 99, § 47, p. 234). It is a known and indisputable fact—of which we are therefore bound to take judicial notice (Evid. Code, § 451, subd. (f))—that because of physiological immaturity the chances that a child of nine years of age or younger can be impregnated are essentially nil. As the majority put it in another context, "To hold otherwise defies not only common sense and reality, but the fundamental laws of biology." (*Ante,* p. 613.)

The true intent of the Legislature in adopting the California statutory rape law, rather, is revealed in the draftsmen's notes to the Penal Code of 1872. Echoing the view of the common law and citing Blackstone, the draftsmen explained that "This provision embodies the well settled

rule of the existing law; that a girl under ten years of age is *incapable of giving any consent* to an act of intercourse which can reduce it below the grade of rape." (Italics added.) (Code commissioners' note, subd. 1, foll. Pen. Code, § 261 (1st ed. 1872) p. 111.) There was no mention whatever of pregnancy prevention.

Nor does the gradual increase in the age of consent between 1889 and 1913 provide a legitimate basis for inferring that pregnancy prevention ever became a goal of the statute. To begin with, under the strict scrutiny test admittedly controlling here it is the state's burden to demonstrate that such changes in the law support its claim of the legislative purpose. But that burden is not and cannot be met. The Attorney General fails to provide us with any reason for these amendments, less still to show they relate in the slightest degree to the age at which a female can conceive. And it could not credibly be asserted that during the period in question, by successive increments of four, two, and two years, the age of female puberty in California rose from ten to eighteen. Again we must take judicial notice of a known and indisputable fact, to wit, that young women are physiologically mature well before they reach their 18th birthday. Thus just as the age of nine is too low for the majority's theory, eighteen is too high: the statute simply cannot be made to fit the pregnancy prevention rationale.

In any event, a far more plausible explanation for these amendments of the statute appears from other legislative history: the age defining this offense was undoubtedly increased because popular views changed both with regard

to the suitable age of women for marriage and the age until which they were deemed appropriately subject to protective legislation. Thus section 56 of the Civil Code of 1872 fixed 15 as the age at which a female could marry without parental consent, but in 1921 the age was raised to 18. (Stats. 1921, ch. 233, § 1, p. 333 [now see Civ. Code, § 4101, subd. (a)].)[1]

Moreover, even after the age of consent had been raised to a level at which conception became biologically possible, this court continued to declare that "The obvious purpose of [the statutory rape law] is the protection of society by protecting from violation the *virtue* of young and unsophisticated girls." (Italics added.) (*People* v. *Verdegreen* (1895) 106 Cal. 211, 214 [39 P. 607]; see also *People* v. *Lourintz* (1896) 114 Cal. 628, 630 [46 P. 613].) Indeed, the court in *Verdegreen* considered the statutory purpose of protecting the virtue of inexperienced young girls to be so pervasive that it held "advances" made with intent to commit statutory rape could constitute an assault to commit that offense. It stated: "It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it, and the prevention of this, as much as the principal act, must undoubtedly have been the intent of the legislature. The incapacity extends to the act and all its incidents." (106 Cal. at p. 215.) Such "approach" and "tampering," of course, cannot result in pregnancy.

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[1]A similar evolution occurred with respect to the minimum age at which minors were protected by child labor laws from industrial exploitation and injury. (See, e.g., Stats. 1905, ch. 18, p. 11; Stats. 1919, ch. 259, p. 415; Stats. 1937, ch. 90, § 1290 et seq., p. 219 et seq. [now Lab. Code, § 1290 et seq.].)

Finally, we recognized the same purpose of the statute —to protect the virtue of young girls—long after the age was raised to 18. In the landmark decision of *People v. Hernandez* (1964) 61 Cal.2d 529, 531 [31 Cal.Rptr. 361, 393 P.2d 673, 8 A.L.R.3d 1092], we stated that the statutory rape law conclusively assumes the under-age female incapable of giving informed consent to sexual intercourse because "she is presumed too innocent and naive to understand the implications and nature of her act. [Citations.] The law's concern with her capacity or lack thereof to so understand is explained in part by a popular conception of the social, moral and personal values which are preserved by the abstinence from sexual indulgence on the part of a young woman. An unwise disposition of her sexual favor is deemed to do harm both to herself and the social mores by which the community's conduct patterns are established. Hence the law of statutory rape intervenes in an effort to avoid such a disposition." Again there was no mention of pregnancy prevention; and the majority point to no legislative history since the date of *Hernandez* to support their repudiation of that unanimous decision's reading of the statutory purposes.[2]

The language of section 261.5 confirms the lessons of its history. The statute makes no attempt to define culpability in terms of sexual intercourse that creates a risk of pregnancy. It does not permit a defense that the couple

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[2]It is true that in 1970 the Legislature separated the prohibition against statutory rape from the forcible rape provisions of Penal Code section 261, and recodified it as "unlawful sexual intercourse" in section 261.5 (Stats. 1970, ch. 1301, § 2, p. 2406.) But the recodification in no way changed the definition of the offense, and the majority do not claim it had any substantive significance.

used contraceptives or employed other pregnancy prevention techniques, even in cases in which the method of contraception is extremely effective.[3] Nor does the statute make any exception for cases in which either the male or female is sterile, or emission did not occur; yet emission is not a prerequisite to conviction, for "Any sexual penetration, however slight, is sufficient to complete the crime." (Pen. Code § 263; see, e.g., *People* v. *Howard* (1904) 143 Cal. 316, 317 [76 P. 1116].) Finally, since *all* girls under the age of 18 fall within its scope, the statute punishes intercourse with a substantial number for whom, as noted above, conception is a sheer impossibility simply because of physiological immaturity.

In short, reducing illicit pregnancies among teenage girls may well be a laudable government objective, but it is wishful thinking to believe that the California statutory rape law was actually enacted or reenacted for the purpose. Under the cases cited at the outset, therefore, it may not properly be invoked to save the statute. (See, e.g., *Arp,* at p. 404 of 19 Cal.3d; *Weinberger,* at p. 648 of 420 U.S. [43 L.Ed.2d at p. 525].)

II

Even if section 261.5 were actually intended to prevent pregnancy, its classification scheme nevertheless remains

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[3]On this point the majority simply adopt the reasoning of *State* v. *Rundlett* (Me. 1978) 391 A.2d 815, 821, footnote 18, which is premised inter alia on the claimed "doubtful efficacy of contraceptives" (*ante,* p. 613). Here again reality is otherwise: certain pregnancy prevention devices (e.g., condoms and contraceptive pills) are both efficacious and widely available to 17-year-old men and women. The majority's disregard of this well-known fact does not make it any less true.

constitutionally deficient. The conduct that creates the risk of pregnancy is an act of sexual intercourse in which *both* the male and the female participate. The act may have been solicited by the male, by the female, or simultaneously by both, and by definition it was wholly consensual. Thus when both parties participate in the decision to engage in the sexual act, each must be presumed equally responsible if pregnancy results.[4] Yet the statute, if it seeks to reduce pregnancy among unwed teenage girls, does so by punishing only the male for his part in this joint conduct. Although it is true that biologically only females can become pregnant, no compelling justification has been offered for holding the male but not the female criminally responsible for the same act. The statute is therefore impermissibly underinclusive. (See, e.g., *Tatro* v. *State* (Miss. 1979) 372 So.2d 283 [statute making it a felony for a male but not a female to sexually fondle a child under 14, held to violate equal protection]; *Commonwealth* v. *MacKenzie* (1975) 368 Mass. 613 [334 N.E.2d 613] [statute making it a misdemeanor for father but not mother to beget a child out of wedlock, held to violate equal protection]; *Lamb* v. *Brown* (10th Cir. 1972) 456 F.2d 18 [statute giving females under 18 the benefit of juvenile court proceedings but limiting those same benefits to males under 16, held to violate equal protection].)

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[4]The section cannot be sustained on the ground that it protects minor females from being unwittingly persuaded to engage in the act by more sophisticated adult males because, as long as the female is under the age of 18, the male can be punished even if he is the same age or younger than the female. Defendant herein, for example, is virtually the same age as the complaining witness.

The majority's arguments to the contrary are demonstrably inadequate. The majority first posit that it is the Legislature's prerogative to recognize "degrees of culpability" when drafting criminal laws. (*Ante,* p. 613.) But the majority then fall into a complete non sequitur when they find it "follows" therefrom (*ibid.*) that the Legislature may reasonably believe that because of the possibility of pregnancy, the female runs greater medical and social risks in sexual intercourse than the male. Of course she runs greater risks if adequate contraceptive measures are not taken; but they are the consequences rather than the causes of her act, and are therefore wholly irrelevant to weighing her moral blame in committing the act in the first place. In our system of justice, offenders are not deemed less cupable merely because they may suffer additional punishment from sources outside the legal system. For example, an outwardly respectable person who engages in illicit drug activity is not rendered less blameworthy when his arrest and conviction for that conduct also result in social ostracism and loss of professional status.

Secondly, the majority reason that because minors are protected from sexual abuse by certain other provisions of law (Pen. Code, §§ 272, 288), section 261.5 "merely provides additional protection for minor females in recognition of the demonstrably greater injury, physical and emotional, which they may suffer." (*Ibid.*) This is another non sequitur. Neither of the statutes relied on by the majority draws any distinction based on sex: section 272 punishes "Every person" who contributes to the delinquency of "any person under the age of 18 years," while section 288 punishes "Any person" who commits lewd or

lascivious acts upon "a child under the age of 14 years." The fact that those statutes are gender-neutral does not somehow give the Legislature the right to enact an "additional" law on the topic that invidiously discriminates on sexual grounds.

Finally, the majority argue that a potential prosecutrix or her family would be unlikely to complain if she were herself subject to prosecution, and hence the inclusion of women in the statutory proscription would as a practical matter "effectively eliminate any possibility whatever of prosecution under the statute." (*Ante,* p. 614.) Surely this is an exaggeration. The testimony of the female participant is not, as the majority assume, the sole evidence of the offense in every case. Even if it were, the district attorney obviously has discretion not to file charges against her. Further, if she remains diffident about testifying to the offense in question, she can simply be granted immunity from prosecution. (Pen. Code, § 1324; see also §§ 1099, 1101 [discharge to be a witness for the prosecution].)

The majority's concern in this regard, moreover, is evidently not shared by the legislatures of our sister states. At least 31 jurisdictions now prohibit sexual intercourse with underage persons of either sex.[5] The majority belabor the

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[5]Alaska (Alaska Stat., § 11.15.120 (Cum. Supp. 1978)); Arizona (Ariz. Rev. Stat., §§ 13-1404, 13-1405 (1978)) Arkansas (Ark. Stat. Ann, §§ 41-1803, 41-1804, 41-1806 (1977)); Colorado (Colo. Rev. Stat., § 18-3-403 (Cum. Supp. 1976)); Connecticut (Conn. Gen. Stat., § 53a-71 (1977)); Florida (Fla. Stat. Ann., §§ 794.011, 794.05 (West 1976)); Illinois (Ill. Stat. Ann., ch. 38, §§ 11-5, 11-6 (Smith-Hurd Supp. 1978)); Indiana (Ind. Code Ann., § 35-42-4-3 (Burns Cum. Supp. 1978)); Iowa (Iowa Code Ann., §§ 709.1-709.4 (West Supp. 1978-1979)); Kansas (Kan. Stat. Ann., § 21-3503 (Cum. Supp. 1978)); Kentucky (Ky. Rev. Stat. Ann., § 510.040 (Baldwin 1975)); Louisiana (La. Rev. Stat. Ann., § 14:42 (West Supp.

obvious when they emphasize that in each of the cited jurisdictions the change from traditional statutory rape law to a sex-neutral classification was accomplished by legislative rather than judicial reform. But the fact that the reform has taken place on such a large scale is itself significant for two reasons. First, it refutes the majority's argument that it is necessary to exclude minor females from the statutory proscription in order to insure its enforcement: in every jurisdiction in which statutory rape is now defined as sexual intercourse by a "person" with a "person" who is under age (see, e.g., Me. Rev. Stat. Ann. tit. 17A, § 252, quoted in *State* v. *Rundlett* (Me. 1978) *supra,* 391 A.2d 815, 816, fn. 2), the minor female in a case such as the one before us would be equally punishable with the minor male. Secondly, and more broadly, the reform demonstrates the widespread belief of our sister states that the purposes of gender-based statutory rape laws—such as those previously

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1978)); Maine (Me. Rev. Stat. Ann., tit. 17A, §§ 252, 254 (West Supp. 1978)); Maryland (Md. Crim. Law Code Ann., art. 27, §§ 463, 464A, 464B (Cum. Supp. 1978)); Massachusetts (Mass. Ann. Laws, ch. 265, § 23 (Michie/Law. Co-op Supp. 1979)); Michigan (Mich. Stat. Ann., § 28.788(2) (Cum. Supp. 1978-1979)); Minnesota (Minn. Stat. Ann., §§ 609.342-609.345 (West Supp. 1979)); Montana (Mont. Rev. Code Ann., §§ 94-5-501, 94-5-503 (1977)); Nebraska (Neb. Rev. Stat., § 28-403.03 (1975)); New Hampshire (N.H. Rev. Stat. Ann., §§ 632-A:2, 632-A:3 (Supp. 1975)); New Mexico (N.M. Stat. Ann., §§ 40A-9-21, 40A-9-23 (Supp. 1975)); North Dakota (N.D. Cent. Code, §§ 12.1-20-03, 12.1-20-05, 12.1-20-07 (Supp. 1977)); Ohio (Ohio Rev. Code Ann., §§ 2907.02, 2907.04 (Page 1975 & Supp. 1978)); Pennsylvania (Penn. Stat. Ann., tit. 18, § 3122 (Purdon Supp. 1978-1979)); South Carolina (S.C. Code, § 16-3-655 (1978)); South Dakota (S.D. Compiled Laws Ann., § 22-22-1 (Supp. 1978)); Vermont (Vt. Stat. Ann., tit. 13, § 3252 (Cum. Supp. 1978)); Washington (Wash. Rev. Code Ann., §§ 9.79.200, 9.79.210, 9.79.220 (1977)); West Virginia (W.Va. Code, §§ 61-8B-2, 61-8B-3, 61-8B-5 (1977)); Wisconsin (Wis. Stat. Ann., § 940.225 (West Supp. 1978-1979)); Wyoming (Wyo. Stat., §§ 6-63.3, 6-63.4 (Interim Supp. 1977)).

in effect in the cited jurisdictions—can be just as effectively served by gender-neutral statutes on the same subject.

The majority conclude (*ante*, p. 614) by flatly denying that section 261.5 reflects adversely on "the capacity of minor females to make intelligent and volitional decisions" on the question of whether to be sexually active. It is true the section does not reflect on their capacity to make *volitional* decisions on the topic, and indeed it presumes the existence of that very ability. But it is no less true that the statutory rape law impugns the capacity of underage women to make such decisions *intelligently.*

The majority purport to find section 261.5 no different in this regard from other provisions of law prohibiting minors from engaging in specified activities regardless of consent. Once again, however, in each such instance the law is gender-neutral and applies equally to minors of both sexes. (See Pen. Code §§ 308, 310, 326.5.) By contrast, although the present statute posits that both sexes are capable of consenting to sexual intercourse, it denies females the right to do so. Even if the purpose of the statute were pregnancy prevention, therefore, its practical effect is to perpetuate the age-old stereotype we recognized in *Hernandez* (at p. 531 of 61 Cal.2d), i.e., that the underage female "is presumed too innocent and naive to understand the implications and nature of her act." As seen by the public in actual operation, section 261.5 assumes that when the minor female "volitionally" decides to be sexually active, she does not really know what she is doing. *Because she is a woman* she is deemed inherently less capable of knowing the facts, of controlling her emotions, of weighing the risks and benefits, and of making intelligent choices—

in short, she is less responsible for her actions—than her male counterpart. As it presently reads, the California statutory rape law thus reflects a belief that the minor female is in need of special protection not only against the male but also against herself, against her "voluntary" but presumptively imprudent decisions in matters of sex.[6]

Such notions are obviously vestiges of a bygone era, remnants of the exploded myth of intrinsic male superiority. They are the product of conventional sex-stereotypical thinking, and revive an outmoded patriarchial view of "the woman's role." Certainly it is permissible for the Legislature to enact statutes for the protection of the moral character of minors of both sexes, and in particular to prevent their sexual exploitation by persons older and more mature than they, but absent a compelling reason for doing so, equal protection forbids the law to foster one standard of socially acceptable conduct for males and another for females. By limiting the definition of the crime "to situations in which the offender is a male and the victim a female, [statutory rape laws] are providing only an incomplete and unsatisfactory protection. At the same time, they are lending their support to society's pernicious and hypocritical double standard of sexual morality." (Kanowitz, Women and the Law (1969) p. 25.) Such considerations not only fail to justify the discrimination of section 261.5, they reinforce the argument for holding it unconstitutional.

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[6]Among other consequences of this belief is the absurdity by which a man can be convicted of statutory rape when he has consensual sexual intercourse with an underage but *married* woman. (See, e.g., *People* v. *Caldwell* (1967) 255 Cal.App.2d 229 [63 Cal. Rptr. 63, 32 A.L.R.3d 1026]; *People* v. *Courtney* (1960) 180 Cal. App.2d 61 [4 Cal.Rptr. 274].)

Central to the equal protection clause is the principle that each individual, regardless of sex, is to be treated as an equal, fully participating, and responsible member of society. (See Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv.L.Rev. 1.) When a legislative classification perpetuates sexual stereotypes it imposes inequalities that stigmatize women and thereby undermine this principle of equal citizenship. As the United States Supreme Court recently explained in striking down a statutory scheme providing that husbands but not wives may be required to pay alimony upon divorce, "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection, [Citation.] Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex." (*Orr* v. *Orr* (1979) ..... U.S. ....., ... [..... L.Ed.2d ....., ..., 99 S.Ct. 1102, 1113].)

I would issue the writ of prohibition.

Tobriner, J., and Newman, J., concurred.

MINUTES

San Francisco, December 5, 1979.

S.F. 23929—Michael M., Petitioner, v. The Superior Court of Sonoma County, Respondent; People, Real Party in Interest. [25 Cal.3d 608]. Petitioner's petition for rehearing denied. Tobriner, J., and Mosk, J., are of the opinion the petition should be granted.

Supreme Court, U. S.
FILED
JUL 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-1344

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

MICHAEL M.,
Petitioner,

VS.

THE SUPERIOR COURT OF SONOMA COUNTY,
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents

On Writ of Certiorari to the Supreme Court of California

JOINT APPENDIX

PETITION FOR CERTIORARI FILED MARCH 1, 1980
CERTIORARI GRANTED JUNE 9, 1980

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7662

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The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Writ of Certiorari:

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 6, 1978	Petition for Writ of Prohibition Filed in the Court of Appeal of California, First Appellate District, Division Three.
September 14, 1978 ..	Order entered denying Petition for Writ of Prohibition.
October 12, 1978	Order of the Supreme Court of California entered granting Petition for Hearing.
October 17, 1978	Alternative Writ of Prohibition issued.
October 18, 1978	Alternative Writ of Prohibition filed.
November 3, 1978	Return to Alternative Writ of Prohibition filed.
November 5, 1979	Opinion and judgment of the Supreme Court of California.
November 19, 1979	Petition for Rehearing filed.
December 5, 1979	Order entered denying Petition for Rehearing.

In the Court of Appeal of the State of California
For the First Appellate District

Division Three

No. 1 Civ. 44994
Superior Court
No. 9132-C

Michael M.
Petitioner,

vs.

The Superior Court of the State of California, in and for the County of Sonoma,
Respondent,

The People of the State of California,
Real Party In Interest.

[Filed Sept. 6, 1978]

PETITION FOR WRIT OF PROHIBITION

To the Honorable Presiding Justice and Associate Justices of the Court of Appeal of the First Appellate District:

Petitioner alleges:

1. A related appeal is pending in the case entitled "The People of the State of California v. Charles Tillmon McKellar, No. 2 Crim 30376", before the Supreme Court of California.

2. Petitioner is the defendant in that certain action described in paragraph 11, *infra,* now pending before the respondent Court.

3. Petitioner has been released on his own recognizance on the charge alleged in the action pending before the respondent Court.

4. Respondent is the Superior Court of the State of California, in and for the County of Sonoma.

5. The Real Party in Interest is the People of the State of California.

6. On June 4, 1978, Petitioner was arrested by Detective Robert Weiworka of the Rohnert Park Police Department.

7. On June 6, 1978, a petition was filed in Superior Court of the State of California for the County of Sonoma sitting as a juvenile court pursuant to Section 602 of the Welfare and Institutions Code. On June 26, 1978, the Defendant was found not a fit and proper subject to be dealt with under the juvenile court law pursuant to Section 707(a) of the Welfare and Institutions Code.

8. On or about June 28, 1978, a verified complaint was filed with a magistrate of the Municipal Court of the State of California, County of Sonoma, entitled "The People of the State of California v. *Michael M.*, Defendant, Case No. 54029", charging the Petitioner with violation of Section 261.5 of the Penal Code.

9. On July 13, 1978, a preliminary examination was held before the Honorable Frank J. Passalacqua, Judge of the Municipal Court of the County of Sonoma, acting as magistrate, at which examination testimony was taken.

10. At the conclusion of the preliminary examination, the magistrate ordered that Petitioner be held to answer in the Superior Court and that he be continued to be released on his own recognizance.

11. On July 27, 1978, an Information was filed in the respondent Court entitled "The People of the State of California, Plaintiff, vs. *Michael M.*, Defendant," charging Petitioner with a violation of Section 261.5 of the Penal Code. A true copy of the Information is attached hereto as Exhibit "A" and made a part hereof.

12. On July 27, 1978, Petitioner was arraigned on the Information before the respondent Court, the Honorable R. Bryan Jamar presiding, and at said time, through counsel, Petitioner moved pursuant to Section 995 of the Penal Code to set aside the Information on the ground that Petitioner was indicted without reasonable or probable cause in that Penal Code Section 261.5 is unconstitutional on its face and as applied and violates the Equal Protection Clauses of both the United States and California Constitutions. On said date Petitioner waived his constitutional right to a speedy trial.

13. The Petitioner is a minor male who was born on December 5, 1960. The Petitioner is informed and believes, and upon such information and belief alleges that the alleged victim of the said offense charged was born on December 23, 1961.

14. On August 22, 1978, the Petitioner's said motion was heard before the Honorable John J. Gallagher, Judge of the respondent Court, and was thereupon denied.

15. On July 27, 1978, Petitioner entered a plea of not guilty. Petitioner's trial on the charge has been set for October 10, 1978, and, unless prohibited by this Court, the respondent Court will proceed to try the case as scheduled.

16. In denying Petitioner's motion to set aside, the respondent Court acted in excess of its jurisdiction in that, as a matter of law, it was required to grant Petitioner's motion and set aside the Information.

17. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law other than by this Petition in that there is no appeal from said order, and this proceeding by prohibition is expressly authorized by Section 999(a) of the Penal Code.

18. Petitioner is a party beneficially interested in this proceeding, and Petitioner, Respondent, and Real Party in Interest are the parties who will be affected by this proceeding.

19. No other petition for writ of prohibition has been made by or on behalf of the Petitioner relating to this matter.

WHEREFORE, Petitioner prays that:

1. An alternative writ of prohibition be issued restraining respondent Court from taking any further steps or proceedings, including trial in the criminal action against Petitioner now pending in respondent Court entitled "The People of the State of California, Plaintiff, vs. *Michael M.*, Defendant", Case No. 9132-C, until further order of this Court.

2. Respondent be directed to show cause before this Court, at a specified time and place, why it should not be absolutely and permanently restrained from taking any further proceedings against, or making any other or further orders affecting the Petitioner in the action herein above described.

3. Petitioner be granted such other and further relief as may be appropriate and just.

Dated: September 5, 1978.

Gregory F. Jilka
Teresa de la O

By Gregory F. Jilka
Attorneys for Petitioner

[Verification, Points and Authorities, and Certificate of Service omitted in printing.]

Exhibit A

Gene L. Tunney, District Attorney
County of Sonoma
212J Hall of Justice
P.O. Box 1964
Santa Rosa, CA 95402
(707) 527-2311
Attorney for The People

Superior Court of the State of California,
County of Sonoma

Court No. 9132-C
D.A. No. 13808
INFORMATION
Ct. I—261.5 PC

The People of the State of California,
Plaintiff,

vs.

Michael M.,
Defendant.

[Filed July 27, 1978]

COUNT I

Michael M. is accused by the District Attorney of the County of Sonoma, State of California, by this information, of a felony, to wit: unlawful sexual intercourse, in that on or about the 4th day of June, 1978, in the County of Sonoma, State of California, the said defendant did violate Section 261.5 of the Penal Code in that he did wilfully, unlawfully and feloniously have and accomplish an act of

sexual intercourse with a female person, to wit: *Sharon,* born 12-23-61, not his wife, who was then and there under the age of eighteen years, to wit: 16 years of age.

Contrary to the form, force and effect of the Statute in such case made and provided, and against the peace and dignity of the People of the State of California.

Gene L. Tunney, District Attorney of the
County of Sonoma, State of California

By /s/ David L. Dunn
David L. Dunn, Deputy District Attorney

Court of Appeal of the State of California
in and for the
First Appellate District

Division Three

No. 44994

Superior Court 9132-C

Michael M.,
Petitioner,

vs.

Superior Court, County of Sonoma,
Respondent,

People of the State of California,
Real Party in Interest.

[Filed Sept. 14, 1978]

By the Court:

The petition for writ of prohibition is denied.

Dated Sep 14 1978

White, P.J.

1 Civil No. 44994

In the Supreme Court of the State of California

In Bank

Michael M.

v.

The Superior Court of Sonoma County.

[Filed Oct. 12, 1978]

Petition for hearing granted and matter transferred to this court.

Let an alternative writ of prohibition issue, to be heard before this court when the proceeding is ordered on calendar.

The alternative writ is to be issued, served and filed on or before October 18, 1978.

The written return to the writ is to be served and filed on or before November 3, 1978.

Bird,
Chief Justice

Mosk,
Justice

Richardson,
Justice

Manuel,
Justice

Newman,
Justice

In the Supreme Court of the State of California

S. F. 23929
No. 1 Civ. 44994
Superior Court
No. 9132-C

Michael M.,

Petitioner,

vs.

The Superior Court of the State of California, in and for the County of Sonoma,

Respondent,

The People of the State of California,

Real Party In Interest.

[Filed Oct. 18, 1978]

ALTERNATIVE WRIT OF PROHIBITION

To the Superior Court of the State of California, in and for the County of Sonoma, Respondent, and to The People of the State of California, Real Party in Interest:

Upon the filing of a verified petition for writ of prohibition, and good cause appearing therefor, IT IS HEREBY ORDERED that:

The Superior Court of the State of California, in and for the County of Sonoma, is commanded to dismiss the Information in the case entitled "The People of the State of California v. *Michael M.*", Case No. 9132-C, or, in the alternative, to show cause before this Court at a time and place to be specified why you should not be absolutely and perma-

nently restrained from taking any further proceedings against or making any other orders affecting the Petitioner in the proceedings described.

IT IS FURTHER ORDERED that you are directed, pending further order of this Court, to desist and refrain from taking any further proceedings in the action described.

This Writ shall be served on the Respondent and the Real Party In Interest on or before October 18, 1978.

The written return, if any, to this Writ shall be filed and served by the Real Party In Interest on or before November 3, 1978.

Dated: Oct 17, 1978.

G. E. Bishel,
Clerk of the Supreme Court
of the State of California

By J. Kavanaugh
Chief Deputy

[Acknowledgments of Service omitted in printing]

In the Supreme Court of the State of California

S.F. No. 23929

Michael M.
Petitioner,
vs.
The Superior Court of the State of California, in and for the County of Sonoma,
Respondent,
The People of the State of California,
Real Party in Interest.

[Filed Nov. 3, 1978]

RETURN TO ALTERNATIVE WRIT OF PROHIBITION AND MEMORANDUM OF POINTS AND AUTHORITIES

To the Honorable Rose Elizabeth Bird, Chief Justice, and the Associate Justices of the Supreme Court of the State of California:

COMES NOW the Real Party in Interest, the People of the State of California, and submits the following Return to the Alternative Writ of Prohibition and Answer to the Petition.

I

Real Party represents that pursuant to this court's order granting the Alternative Writ, proceedings against petitioner are being held in abeyance pending further order of this court.

II

Real Party denies the allegations in Paragraph 16 of the Petition for Writ of Prohibition for the reasons set forth in the Points and Authorities attached hereto, to wit, that the respondent court was within its jurisdiction in denying Petitioner's motion to set aside the information.

III

In all other respects, Real Party admits the essential allegations of the petition.

WHEREFORE, the People of the State of California, Real Party in Interest, prays that:

1. The relief sought by petitioner herein be denied;

2. The petition for writ of prohibition on file herein be denied;

3. The alternative writ of prohibition previously issued by this court be discharged and the matter remanded to respondent court for trial on the merits of the criminal charges; and

4. This court grant such other relief as may be deemed proper and just.

DATED: November 23, 1978.

Respectfully submitted,
Evelle J. Younger,
Attorney General
Jack R. Winkler,
Chief Assistant Attorney General—
Criminal Division
S. Clark Moore,
Assistant Attorney General
William R. Pounders,
Deputy Attorney General

/s/ Sandy R. Kriegler,
Sandy R. Kriegler,
Deputy Attorney General
Attorneys for Real Party
in Interest

[Verification, Points and Authorities, and Certificate of Service omitted in printing]

[4]

Municipal Court of California, County of Sonoma
Department No. 2

Violation of Section 261.5 of the Penal Code
of the State of California, to wit,
a felony

The People of the State of California,
Plaintiff,

vs.

Michael M.,
Defendant.

[Lodged as an exhibit on Oct. 12, 1978.]

Thursday, July 13th, A. D., 1978 - 1:32 o'clock P.M.

The preliminary hearing of the above-named defendant, *Michael M.*, came on regularly this day at the hour of 1:32 o'clock p.m. thereof, before Honorable Frank J. Passalacqua, Judge of the Municipal Court of California, County of Sonoma, sitting in said Court as a Committing Magistrate.

The People were represented by David L. Dunn, Esq., Deputy District Attorney of Sonoma County, Hall of Justice, 2555 Mendocino Avenue, Santa Rosa, California.

The defendant, *Michael M.*, was personally present and in attendance upon the Court, and was attended and represented by his counsel, Gregory F. Jilka, Esq., Attorney at Law, 8099 La Plaza, Post Office Box 111, Cotati, California, 94928.

[5] Joseph K. McKnight, Certified Court Reporter, was present and acting.

The following proceedings were had and the following testimony was taken, to wit:

The Court: Let's proceed in the *Michael M.* case. Call your first witness.

Mr. Jilka: Your Honor, may I? Before any witnesses are presented, I have had a discussion with Mr. Dunn and I believe that he is prepared to stipulate and make a minor stipulation in this case as to the date of birth of the defendant being December 5th, 1960.

Mr. Dunn: So stipulated.

The Court: The defendant's date of birth is December 5th, 1960.

Mr. Jilka: Your Honor, in light of that at this time—I would like to make a motion at this time, a motion to determine this offense to be a misdemeanor under subdivision b(5) of Penal Code Section 17. The Court is probably aware that under that Section, a crime which is punishable as both a felony and a misdemeanor may be deemed to be a misdemeanor by the Court at any time prior to the preliminary examination or to the conclusion of the preliminary examination. I would point out the case of Esteybar versus Municipal Court 5 Cal 3rd 119, page 126 in which the Court states that a defendant is entitled to have an independent determination of whether he should be held to answer on a felony or a misdemeanor.

In support of this motion in the case of my client, [6] it should be noted that the victim was approximately 16 and a half years old at the time of the offense. The defendant

was approximately 17 and a half years old. There is a one-year, eighteen day difference in their ages. There is no allegation of force. This is simply not the case where a 42-year old man is charged with seducing a babysitter or anything like that.

What we have here is the case where the defendant and the victim are both minors and they are close in age. Now, under these circumstances, we don't feel that the allegation of the felony is proper. I would point out to the Court that in other states the age for unlawful intercourse is lower than in this state, in some cases as low as 14. For example, in New Hampshire. It is difficult to conceive of the facts as alleged in this Complaint being a felony in California and not criminal conduct at all in other states. We feel that the interests of justice require, in this case, that the charge be deemed a misdemeanor. This will save much tax payers time and money in the prosecution of this case.

The Court: Very well. The motion will be submitted. I will make a determination after hearing the evidence at this preliminary examination.

Mr. Jilka: Very well, your Honor.

The Court: Call your first witness.

Mr. Dunn: The People would call *Sharon.*

The Clerk: Raise your right hand, please.

[7] *SHARON*

produced as a witness in behalf of the People, having been first duly and regularly sworn by the Clerk to testify the truth, the whole truth and nothing but the truth, testified as follows, to wit:

The Clerk: Take the stand.

DIRECT EXAMINATION

BY MR. DUNN:

Q. Would you please state your full name and spell your last name?

A. *Sharon* * * *

Q. Is that Miss or Mrs.?

A. Miss.

The Court: Sharon, would you slide over in front of the microphone, please, so that it picks up your voice?

BY MR. DUNN:

Q. What city do you reside in?

A. Rohnert Park.

Q. What is your occupation?

A. A student.

Q. What is your date of birth?

A. 12/23/61.

Q. What was your age on June the 4th of this year?

A. Sixteen.

Q. Sixteen?

A. Yes.

[8] Q. Now, on June 4th of this year, were you married to the defendant in this action?

A. No.

Q. Have you ever been married to the defendant?

A. No.

Q. On June the 4th, at approximately midnight — midnight of June the 3rd, were you in Rohnert Park?

A. Yes.

Q. Is that in Sonoma County?

A. Yes.

Q. Did anything unusual happen to you that night in Rohnert Park?

A. Yes.

Q. Would you briefly describe what happened that night? Did you see the defendant that night in Rohnert Park?

A. Yes.

Q. Where did you first meet him?

A. At a bus stop.

Q. Was anyone with you?

A. My sister.

Q. Was anyone with the defendant?

A. Yes.

Q. How many people were with the defendant?

A. Two.

Q. Now, after you met the defendant, what happened?

A. We walked down to the railroad tracks.

Q. What happened at the railroad tracks?

A. We were drinking at the railroad tracks and we walked [9] over to this bush and he started kissing me and stuff, and I was kissing him back, too, at first. Then, I was telling him to stop —

Q. Yes.

A. — and I was telling him to slow down and stop. He said, "Okay, okay." But then he just kept doing it. He just

kept doing it and then my sister and two other guys came over to where we were and my sister said — told me to get up and come home. And then I didn't —

Q. Yes.

A. — and then my sister and —

Q. All right.

A. — David, one of the boys that were there, started walking home and we stayed there and then later —

Q. All right.

A. — Bruce left Michael, you know.

The Court: Michael being the defendant?

The Witness: Yeah. We was laying there and we were kissing each other, and then he asked me if I wanted to walk him over to the park; so we walked over to the park and we sat down on a bench and then he started kissing me again and we were laying on the bench. And he told me to take my pants off.

I said, "No," and I was trying to get up and he hit me back down on the bench and then I just said to myself, "Forget it," and I let him do what he wanted to do and he took my pants off and he was telling me to put my legs around him and stuff —

[10] Mr. Dunn: All right.

The Witness: — and then when he was —

Mr. Dunn: Excuse me just a moment:

BY MR. DUNN:

Q. Did you have sex?

Mr. Jilka: Your Honor, may she finish, please?

The Court: You may interrupt during the course of a narrative. Go ahead.

BY MR. DUNN:

Q. Did you have sexual intercourse with the defendant?

A. Yeah.

Q. He did put his penis into your vagina?

A. Yes.

Q. You said that he hit you?

A. Yeah.

Q. How did he hit you?

A. He slugged me in the face.

Q. With what did he slug you?

A. His fist.

Q. Where abouts in the face?

A. On my chin.

Q. As a result of that, did you have any bruises or any kind of an injury?

A. Yeah.

Q. What happened?

A. I had bruises.

The Court: Did he hit you one time or did he hit you more than once?

[11] The Witness: He hit me about two or three times.

BY MR. DUNN:

Q. Now, you have been describing the defendant as Michael or Mike. Is that individual in the courtroom today?

A. Yes.

Q. Would you please point to him?

A. Right there.

Mr. Dunn: May the record indicate that she has pointed to the defendant?

The Court: It may.

BY MR. DUNN:

Q. Now, during the course of that evening, did the defendant ask you your age?

A. Yeah.

Q. And what did you tell him?

A. Sixteen.

Q. Did you tell him you were sixteen?

A. Yes.

Q. Now, you said you had been drinking, is that correct?

A. Yes.

Q. Would you describe your condition as a result of the drinking?

A. I was a little drunk.

Mr. Dunn: I have no further questions at this time, your Honor.

CROSS-EXAMINATION

BY MR. JILKA:

[12] Q. Miss * * *, what were you doing in Rohnert Park prior to meeting with Mr. *M.*?

Mr. Dunn: Objection, your Honor. That is irrelevant.

Mr. Jilka: Your Honor, I think we are entitled to inquire.

The Court: It is foundational. You may answer.

The Witness: I was waiting at the bus stop for the bus.

BY MR. JILKA:

Q. What had you been doing prior til that, previously?

A. Me and my sister, we left our house and we walked to the liquor store and we bought a half pint of Southern Comfort and we bought two Pepsis to go with it, and we

mixed our drinks. We walked to the bus stop, just waited and that is when Michael and two other guys came walking up.

Q. Did you buy the Southern Comfort?

Mr. Dunn: Objection. That is irrelevant, your Honor.

Mr. Jilka: Well, your Honor, I think here it is correct. As a witness, it has something to do with her state of sobriety. This is foundational to that.

Mr. Dunn: She has already testified as to her state of sobriety, your Honor.

Mr. Jilka: Well, this is cross-examination.

The Court: Well, the objection is sustained.

BY MR. JILKA:

Q. What size of Southern Comfort did you buy?

[13] A. A half pint.

Q. Did you buy it yourself?

A. No, my sister did.

Q. What is your sister's name?

A. Debra.

Q. How old is she?

A. Twenty-one.

Q. Did you drink any of the Southern Comfort from that bottle?

A. Yeah.

Q. How much did you drink?

A. About half of it.

Q. Okay. How much do you weigh?

A. 122.

Q. When did you start drinking that evening?

A. Around 11:00—about 10:30 or 11:00 o'clock.

Q. Did you ever drink before that night?

M. Dunn: Objection, your Honor. That is irrelevant.

Mr. Jilka: Your Honor, the amount of alcohol she consumed is only one factor in determining her sobriety. Now, if she had a drink before that night: it is likely that the alcohol would have had greater effect than if she had regularly consumed it.

The Court: The objection is sustained.

By Mr. Jilka:

Q. You stated you were mixing the Southern Comfort with coke?

[14] A. Pepsi.

Q. Pepsi?

A. Yes.

Q. How did you feel the next day? Did you have a headache?

A. No, I was just tired.

Q. Did you feel nauseated?

A. No.

Q. Did you have anything to eat that night?

A. No.

Q. Nothing at all. When was your last meal prior to starting to consume the Southern Comfort?

A. It was around noon.

Q. Around noon. What did you have to eat?

A. I don't remember.

Q. Do you remember if it was a big meal or a small meal?

A. No.

Q. How did you happen to meet with Mr. *M.*

A. Him and his friends was riding bikes. They went past us, then they came back and they asked us if we wanted to drink some wine.

Q. Who were his friends? Did you know them?

A. No.

A. Do you know their names?

A. Yeah.

Q. What are their names?

A. Bruce Harper and David Simonpietri.

Q. Did you know either of these two people before that night?

[15] A. No.

Q. What was your reply to this inquiry concerning whether or not you wanted to go drinking?

A. We wasn't going to go at first, but then we started talking with them for about ten minutes. Then we decided we would; so we walked out to the railroad tracks.

Q. How far away are the railroad tracks from where you met the boys?

A. I don't know how far it was.

Q. Was it more than ten blocks?

A. No.

Q. Do you remember how long it took you to walk to the railroad tracks?

A. About 20 minutes.

Q. Twenty minutes?

A. Yes.

Q. Did anything unusual happen while you were walking to the railroad tracks?

A. No.

Q. Did you and Mr. *M.* start to hold hands?

A. When we were at the railroad tracks.

Q. Did you hold hands with him before then?

A. No.

Q. How far down the railroad tracks were you walking from the road?

A. I don't know. It wasn't very far. I don't remember.

Q. What did you first do when you got there?

A. We sat down by the railroad tracks and we started talking **[16]** and drinking.

Q. Had you been drinking while you were walking?

A. Yeah.

Q. What were you drinking while you were walking?

A. Southern Comfort, and Pepsi.

Q. How long did you sit there and talk at the railroad tracks?

A. About an hour; a couple of hours.

Q. And who was with you at that time?

A. My sister and I and Michael and David and Bruce.

Q. So there were a total of five people?

A. Yeah.

Q. And this is your sister named what?

A. Debra.

Q. Debra?

A. Yeah.

Q. Did you have any occasion to leave the group while you were there at the railroad tracks?

A. I don't understand the question.

Q. Did you go out by yourself or away from the others?

A. No.

Q. Did you go off with Mr. *M.* away from the others?

A. Yeah.

Q. Why did you do that?

A. I don't know. I guess I wanted to.

Q. Did you have any need to go to the bathroom when you were there?

A. Yes.

[17] Q. And what did you do?

A. Me and my sister walked down the railroad tracks to some bushes and went to the bathroom.

Q. Now, you and Mr. *M.*, as I understand it, went off into the bushes, is that correct?

A. Yes.

Q. Okay. And what did you do when you and Mr. *M.* were there in the bushes?

A. We were kissing and hugging.

Q. Were you sitting up?

A. We were laying down.

Q. You were lying down. This was in the bushes?

A. Yes.

Q. How far away from the rest of them were you?

A. They were just bushes right next to the railroad tracks. We just walked off into the bushes; not very far.

Q. Could you hear the other people talking?

A. No.

Q. Did you do anything other than hugging and kissing when you were in the bushes with Mr. *M.*?

A. No.

Q. Did you ever touch his penis?

A. No.

Q. Did you state that at that time he tried to get your pants off?

A. In the bushes?

Q, Yes. Did he?

A. No.

[18] Q. Okay. Did anything else unusual happen when you were out in the bushes with Mr. *M.*?

A. No.

Q. Did he hit you then?

A. I think—yeah—I don't remember.

Q. You think he hit you but you don't remember. How many times did he hit you?

A. I don't remember.

Q. Did you—excuse me—Did you hit him?

A. No.

Q. You didn't hit him?

A. (Negative head shake.)

Mr. Jilka: May the record indicate the witness is nodding her head in the negative?

The Court: I didn't see it.

By Mr. Jilka:

Q. Did you hit Mr. *M.* at that time?

A. No.

Q. Thank you. How long were you and Mr. *M.* off by yourselves?

A. About thirty minutes.

Q. Thirty minutes?

A. Yeah.

Q. Then did you come back with the group, or what happened?

A. No. My sister and the other guys came over there. They went home. It was just me and Michael and then we walked to the park.

[19] Q. So your sister and the other two boys came over to where you were, you and Michael were, is that right?

A. Yeah.

Q. What did they say to you, if you remember?

A. My sister didn't say anything. She said, "Come on, Sharon, let's go home."

Q. She asked you to go home with her?

A. (Affirmative nod.)

Q. Did you go home with her?

A. No.

Q. You wanted to stay with Mr. *M.*?

A. I don't know.

Q. Was this before or after he hit you?

A. Before.

Q. Okay. So it was—So then what happened, did—Did the group of—the three of them leave? Did all three of them leave, your sister and the two boys?

A. My sister and David left first and then Bruce left after they did.

Q. How long did Bruce stay around?

A. About five minutes.

Q. What happened in the five minutes that Bruce stayed there with you and Michael?

A. I don't remember.

Q. You don't remember at all?

A. (Negative head shake.)

Q. Did you have occasion at that time to kiss Bruce?

A. Yeah.

Q. You did? You were kissing Bruce at that time?

[20] A. (Affirmative nod.)

Q. Was Bruce kissing you?

A. Yes.

Q. And were you standing up at this time?

A. No, we were sitting down.

Q. You were sitting down, so you had left Mr. *M.* and you were making out with this fellow Bruce?

Mr. Dunn: Objection to using the words "making out".

Mr. Jilka: I will rephrase the question.

The Court: All right.

Mr. Dunn: I believe she testified she was kissing him.

By Mr. Jilka:

Q. Okay. So at this point in time you had left Mr. *M.* and you were hugging and kissing with Bruce, is that right?

A. Yeah.

Q. And you were sitting up?

A. Yes.

Q. Was your sister still there then?

A. No. Yeah, she was at first.

Q. What was she doing?

A. She was standing up with Michael and David.

Q. Yes. Was she doing anything with Michael and David?

A. No, I don't think so.

Q. Whose idea was it for you and Bruce to kiss? Did you initiate that?

A. Yes.

[21] Q. What happened after Bruce left?

A. Michael asked me if I wanted to go walk to the park.

Q. And what did you say?

A. I said, "Yes."

Q. And then what happened?

A. We walked to the park.

Q. Do you know where this park is?

A. I don't remember where it was.

Q. How long did it take you to get to the park?

A. About ten or fifteen minutes.

Q. And did you walk there?

A. Yes.

Q. Did Mr. *M.* ever mention his name?

A. Yes.

Q. What did he tell you with respect to his name?

A. He says—He was telling us his name was *Michael M.*

Q. He said it like that: *"Michael M."*

A. Yes.

Q. What did you do once you got to the park?

A. Sat on the bench.

Q. And then what happened?

A. Then he started kissing me.

Q. Did you kiss him back?

A. I don't think so, no.

Q. What did you do?

A. I was trying to make him stop it and then we were laying on the bench.

[22] Q. How did you get to the lying position?

A. We just layed down.

Q. So you lay down with him, is that right?

A. Yeah.

Q. Then what happened?

A. And then he told me to take my pants off and I said, "No." And I was trying to get up and he hit me back down.

Q. Then what happened?

A. Then he took my pants off.

Q. Did you resist when he took your pants off?

A. No.

Q. Did he take your pants off before he hit you or after?

A. After

Q. Okay. Then what happened?

A. And then he took my pants off. He was telling me to put my legs around him.

Q. Did you ever fall down that night?

A. No.

Q. Do you think you might have fallen down and not remembered it?

A. No.

Q. The next day did you have occasion to ride around in a police car?

A. Yeah.

Q. Okay. And when you were riding around in the police car, did you tell the policeman that you recognized the person that you were with the night before?

A. I don't understand the question.

[23] Q. When you were riding around in the police car, did you see a man in a front yard?

A. Yeah.

Q. Okay. Did you tell the policeman something about that man?

A. My sister said, "That is him." I looked and I said, "Yeah, I think it is."

Q. So meaning that this was the man that you had intercourse with the prior night?

A. Yeah.

Q. Is that man here in the courtroom today?

A. No.

Q. He is not here today?

A. (Negative head shake.)

Q. That man is not Mr. *M.* next to me?

A. No.

Q. When you got a closer look at the man, did you tell the policeman that you had made a mistake?

A. No. Yeah, yeah.

Q. How soon after?

A. After I found out his age.

Q. And how long after you saw the man first did you find out what his age was?

A. About fifteen minutes.

Q. Did they handcuff the man and take him to the police station first?

A. Yeah.

Q. How did you find out what the man's age was?

[24] A. I seen his driver's license.

Q. The police showed you his driver's license?

A. Yeah.

Q. Did the police show you any photographs that day?

A. Yeah.

Q. How many photographs did they show you?

A. Oh, I was looking in a pack of photos, the pictures, and then he showed me—and then he showed me this thing with about seven pictures on it.

Q. He showed you this thing without about seven pictures on it. What kind of a thing do you mean?

A. I was a piece of paper or something.

Q. Was it lying on a table flat or something like that?

A. No. He handed it to me and I looked at the pictures.

Q. Could you see all of the pictures at the same time?

A. Yeah, they were all lined up.

Q. Were they all the same size?

A. Yeah.

Q. Do you remember the colors, if the pictures were color—or black and white?

A. Colored.

Q. They were all colored?

A. I think so.

Q. Were there any names on the pictures?

A. Huh-uh.

Q. Were there any numbers on the pictures?

A. I don't remember.

Q. Did you ever see Mr. *M.* in the daylight?

[25] A. No.

Q. It was always at night when you were with him?

A. Yes.

Q. Did you see him around streetlights at all, or was it pretty much dark when you saw him?

A. Yeah. I seen him in the streetlights.

Q. Do you remember how close you were to the streetlights when you saw him?

A. Right underneath the streetlights.

Q. Did you see him well or dimly or—

A. I seen him well.

Q. Had you ever had sexual intercourse before that night?

Mr. Dunn: Objection, your Honor.

The Court: Sustained.

Mr. Jilka: Nothing further.

The Court: Thank you. You may step down.

(Witness excused.)

The Court: Further witnesses?

(Whereupon, the District Attorney confers privately with the investigating officer, Robert Wieworka.)

Mr. Dunn: The People would call Detective Wieworka.

The Court: What for?

Mr. Dunn: Your Honor—

The Court: For what?

Mr. Dunn: —Detective Wieworka is required to testify as to the statements that were made by the defendant **[26]** on his apprehension.

The Court: Do you know what they are?

Mr. Dunn: Yes, sir.

The Court: Do you have them in the report?

Mr. Jilka: I don't see the point, your Honor.

The Court: I don't either. Mr. Dunn insists on overplaying every one of his cases.

Mr. Dunn: The People have no further witnesses.

The Court: Very well. Do you have comment with reference to the motion that was earlier made, Mr. Dunn?

Mr. Dunn: I think the only comment that I would make at this time would be the fact that the witness did testify that there was physical assault, your Honor. He used his fist and struck her two or three times, and so there was some degree of physical coercion involved in this incident. It wasn't a case where she voluntarily submitted to the act.

The Court: Very well. After hearing the evidence, the Court is convinced it should go on to the Superior Court and I am going to deny the 17b(5) motion,

The Court finds there is sufficient evidence to hold the defendant to answer to the felony alleged in the Complaint herein.

The Information will be filed in the Superior Court on the 28th day of July at 8:30 in Department No. 2 of the Superior Court. Absent the reason I take it under submission — absent the circumstances testified to here, Mr. Jilka, I think this Court would have had this—had **[27]** this been a situation of mutual admiration for one another under the influence — but with the state of a misdemeanor level — There is a little bit more to it than that. I do want you to remind me if this comes back as a misdemeanor, again that the People put the taxpayers to — in the event they decide to come back here as a misdemeanor — because I am not going to handle it.

Mr. Jilka: Very well, your Honor.

The Court: I think the defense would be in a very advantageous position if this should come back. I have been given too many 17b(5)'s, either stipulated or suggested.

Any way, then they come back. After all the District Attorney's office has hard put the taxpayers to — Very well. We stand recessed.

(Whereupon, at the hour of 2:01 o'clock p.m. this day, this preliminary examination is concluded.)

Supreme Court, U.S.
FILED
MAY 13 1980
OAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1344

MICHAEL M.,

Petitioner,

vs.

THE SUPERIOR COURT OF SONOMA COUNTY, THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION

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THE SUPERIOR COURT OF SONOMA COUNTY, THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION

Question Presented

Whether section 261.5 of the Penal Code of the State of California, defining the offense of unlawful sexual intercourse (formerly statutory rape), violates equal protection of the law under the Fourteenth Amendment of the United States Constitution on the ground that the statute contains an impermissible classification based upon gender.

Statement of the Case

Petitioner was charged in a one count information filed on June 27, 1978, by the District Attorney of Sonoma County with unlawful sexual intercourse, in violation of California Penal Code section 261.5. Petitioner's motion to dismiss the information on the ground that Penal Code

section 261.5 violates equal protection of the law under the California and United States Constitutions was denied.

Petitioner's application to the California Court of Appeal, First Appellate District, for a Writ of Prohibition to restrain proceedings was denied without comment on September 14, 1978. On October 12, 1978, the California Supreme Court issued an Alternative Writ of Mandate ordering Respondent Sonoma County Superior Court to show cause why the information should not be dismissed. Following oral argument, the California Supreme Court found a compelling state interest to support Penal Code section 261.5 and denied the Writ of Mandate on November 5, 1979. A petition for rehearing was denied on December 5, 1979.

ARGUMENT

California Penal Code Section 261.5 Does Not Contain an Impermissible Classification Based on Gender.

Petitioner argues that California Penal Code section 261.5 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because it contains a gender-based classification of both defendants and victims. (Petn., pp. 6-10.) Petitioner's contention was rejected by the California Supreme Court, which found pregnancy prevention to be the purpose of Penal Code section 261.5[1] and determined that the classification promoted a compelling state interest.

The question of the validity of the statutory rape provisions of the various states has been the recent subject of numerous cases, although this Court has yet to address the issue. The overwhelming weight of authority, including the instant case, has upheld the statutes in question in the face of equal protection challenges.[2] The sole exception to the majority of cases is the First Circuit's opinion in *Meloon v. Helgemoe* (1st Cir. 1977) 564 F.2d 602, cert. den., 436 U.S. 950, 56 L.Ed.2d 793, 98 S.Ct. 2858, which struck down New Hampshire's former statutory rape provision.

The California Supreme Court found that Penal Code section 261.5 does contain a classification scheme based on

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[1]Penal Code section 261.5 provides that "[u]nlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years."

[2]*Michael M. v. Superior Court* (Cal. 1979) 25 Cal.3d 608, 601 P.2d 571; *Rundlett v. Oliver* (1st Cir. 1979) 607 F.2d 495; *Olson v. Nevada* (1979) 588 P.2d 1018; *State v. Rundlett* (Maine 1978) 391 A.2d 815; *Ex Parte Groves* (Tex. 1978) 571 S.W.2d 888; *People v. Fauntleroy* (N.Y. 1978) 405 N.Y.S.2d 931; *People v. Salinas* (Colo. 1976) 551 P.2d 703; *State v. Meloon* (N.H. 1976) 366 A.2d 1176; *State v. Drake* (Iowa 1974) 219 N.W.2d 492; *In re Interest of J.D.G.* (Mo. 1973) 498 S.W.2d 786.

gender because "only females may be victims, and only males may violate the sections." (*Michael M. v. Superior Court, supra*, at p. 611.) The court upheld this classification scheme after determining that the statutory purpose was to prevent pregnancy in females below the age of 18, and finding that pregnancy prevention constituted a compelling state interest. (*Michael M. v. Superior Court, supra*, at pp. 611-613.) In support of its conclusions, the court relied heavily on statistics revealing the large numbers of children born to unwed teenagers below the age of 18, the disproportionate use of abortion services by teenagers and the very real physical and social harm which frequently accompanies such pregnancies. (*Michael M. v. Superior Court, supra*, at pp. 611-612.)

It is clear, therefore, that the California Supreme Court carefully examined the legislative purpose behind Penal Code section 261.5 in determining its constitutionality. It is well settled that state courts are the ultimate expositors of state law, and where it is necessary to determine what objectives are sought to be served by a statute, the views of the highest state court should be given careful consideration. (*Reitman v. Mulkey* (1967) 387 U.S. 369, 376-379, 18 L.Ed.2d 830, 87 S.Ct. 1627.) Respondent submits that the thoughtful analysis of the California Supreme Court is amply supported by the data upon which it relied, and that determination should be respected by this Court.

The constitutionality of Penal Code section 261.5 was judged by the California Supreme Court under the "strict scrutiny" equal protection test applicable under article I, section 7, subdivision (a) of the California Constitution. (See *Sail'er Inn v. Kirby* (Cal. 1971) 5 Cal.3d 1, 485 P.2d 529.) Under the Equal Protection Clause of the Fourteenth Amendment, upon which petitioner relies in the instant petition, a classification based upon gender withstands scrutiny

if it serves important governmental objectives and is substantially related to those objectives. (*Orr v. Orr* (1979) 440 U.S. 268, 279, 59 L.Ed.2d 306, 99 S.Ct. 1102; *Craig v. Boren* (1976) 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397.) In view of the heightened scrutiny given Penal Code section 261.5 by the California Supreme Court, the constitutionality of the statute under the less rigorous standard of the Fourteenth Amendment is manifest.

That the prevention of pregnancy in unwed women under the age of 18 is an important governmental interest is not seriously disputed by petitioner. Indeed, pregnancy prevention has been recognized as an important governmental objective in several cases. (*Olson v. Nevada, supra*, 588 P.2d at p. 1019; *State v. Rundlett, supra*, at pp. 818-822; *State v. Meloon, supra*, 366 A.2d at p. 1177; *In re Interest of J.D.G., supra*, 498 S.W.2d at pp. 792-793.) Certainly there can be little doubt that Penal Code section 261.5 is substantially related to the objective of pregnancy prevention since it prohibits the very act necessary to conception. Penal Code section 261.5 clearly withstands petitioner's challenge under the Equal Protection Clause of the Fourteenth Amendment.

Finally, respondent points out that in addition to the objective of pregnancy prevention, Penal Code section 261.5 is part of the larger governmental objective of prohibiting sexual abuse of all minors in California. (See, *e.g.*, Cal. Pen. Code, § 272 (contributing to the delinquency of a minor); Cal. Pen. Code, § 288 (lewd and lascivious conduct on the body of a child under the age of 14); and § 647a (annoying or molesting any child under the age of 18).) Penal Code section 261.5 is merely part of a comprehensive legislative scheme against sexual abuse of minors of both sexes by perpetrators of both sexes. Viewed in conjunction with these pertinent provisions of the California Penal Code,

it is apparent that Penal Code section 261.5 is part of a statutory scheme substantially related to the important governmental interest of prohibiting sexual abuse of minors. Penal Code section 261.5 was properly found by the California Supreme Court below not to violate the Equal Protection Clause of the Fourteenth Amendment.

Conclusion.

For the foregoing reasons, respondent urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 24 1980
MICHAEL RODAK, JR., CLERK

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OCTOBER TERM, 1980

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vs.

THE SUPERIOR COURT OF SONOMA COUNTY,
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents.

On Writ of Certiorari to
The Supreme Court of California

BRIEF OF THE PETITIONER

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QUESTION PRESENTED

Whether the prosecution of petitioner, age 17, under California's statutory rape law (Penal Code §§ 261.5, 264) for engaging in sexual intercourse with a sixteen year old female violates petitioner's right to equal protection of the law as guaranteed under paragraph 1 of the Fourteenth Amendment of the United States Constitution.

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BRIEF OF THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of California is reported at 25 Cal.3d 608 and at 601 P.2d 572.

JURISDICTION

The decision of the Supreme Court of California was entered on November 5, 1979 (Pet. W. Cert. p. A-1). A Petition for Rehearing was denied on December 5, 1979 (Pet. W. Cert. p. A-25). The Petition for Writ of Certiorari was timely filed on March 1, 1980 and was granted on June 9, 1980. This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves California Penal Code Section 261.5, which defines the offense of "unlawful intercourse," and California Penal Code Sections 264 and 18 which provide for the punishment for violation of Section 261.5. This case also involves Section 1 of the Fourteenth Amendment of the United States Constitution. Each of these provisions is set forth at length in the Appendix to this brief.

STATEMENT OF THE CASE

On September 6, 1978, a Petition for Writ of Prohibition was filed in the California Court of Appeal, First Appellate District (A. 2-6). The petition alleged that the petitioner, Michael M.,[1] was facing an impending criminal trial in Sonoma County Superior Court for a single violation of California Penal Code Section 261.5 (A. 4, 7-8). The petition further alleged that Michael had sought dismissal of the charge against him on the ground that Penal Code Section 261.5 violates the federal and state constitutional equal protection clauses (A. 4). This motion was denied by the trial court on August 22, 1978 (A. 4). Michael's petition requested that Superior Court be enjoined from further prosecution (A. 5-6).

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[1]This name is a pseudonym used pursuant to the policy of the California appellate courts "not to disclose the identity of minors" in juvenile proceedings. See Formichi, California Style Manual, (2nd Ed.) §§ 213, 214, 245, 246. The use of this pseudonym has been continued in light of this court's apparent policy allowing the use of pseudonyms where used below. See Stern and Gressman. Supreme Court Practice (5th Ed.) § 6.19(6), p. 440.

The Court of Appeal denied Michael's Petition for Writ of Mandate on September 14, 1978, without comment (A. 9).

At Michael's request, the Supreme Court of California transferred that petition to that court on October 12, 1978 (A. 10), and issued an Alternative Writ of Prohibition commanding the Superior Court to show cause why the charge should not be dismissed (A. 11-12). The Real Party in Interest filed a return to the Alternative Writ on November 3, 1978, which admitted each of the factual allegations of the petition (A. 13-15).

On November 5, 1979, the Supreme Court of California denied the Writ of Mandate by a narrow majority (Pet. W. Cert. p. A-1). Michael's Petition for Rehearing was filed on November 19, 1979, and was denied on December 5, 1979 (Pet. W. Cert. p. A-25).

The Petition for Writ of Certiorari was filed in this court on March 1, 1980 and was granted on June 9, 1980.

SUMMARY OF ARGUMENT

Michael, the Petitioner, is charged with the crime of "unlawful intercourse," California's version of statutory rape, for engaging in sexual intercourse with Sharon, a 16 year old female. Michael, who was 17 years old at the time of the alleged offense, faces a maximum sentence of three years in prison while Sharon cannot violate the gender based statute. The contrast of imprisonment for males for conduct which females can engage in with impunity is perhaps the greatest disparity in the treatment of the sexes ever challenged before this court.

Women have been traditionally stereotyped as helpless and dependent. Statutory rape laws such as California's reflect and perpetuate the stereotype by presuming that young women are too naive to consent to sexual intercourse. This court has recognized that discrimination based upon traditional sex roles is inconsistent with women's attainment of equality of right and opportunity. California's statutory rape law should therefore be regarded with disfavor because it perpetuates and reinforces the customary roles of the sexes.

The statute's classification of males and females is arbitrary. The trait of maleness is flatly equated with culpability irrespective of whether the female is older or the aggressor. Sex is therefore used as an absolute proxy for fault. Since the statute's irrebuttable presumption of male culpability does not comport with reality, the criminal sanctions which California assesses only against males are arbitrary.

California cannot meet its burden of demonstrating that the alleged purpose of the statute is substantially furthered by its gender based classifications. The only argued purpose for the statute, the prevention of teenage pregnancies, cannot justify the disparity in the treatment of the sexes. The statute operates unhesitatingly even when pregnancy is physiologically impossible or when reliable birth control devices are used. Numerous acts are therefore prohibited which cannot result in pregnancy. The need for California to employ a gender based law is dubious in light of the adoption of gender neutral "statutory rape" laws by more than seventy percent of the states. The Cali-

fornia statute is ill suited as a deterrent because the offense is not ordinarily subject to detection. Arrests for violation of the statute are so infrequent that the chances of apprehension are infinitesimal. The statute therefore fails to serve any important governmental interest and is wholly unrelated to the achievement of any legitimate governmental goal.

The record is devoid of any evidence that a concern for teenage pregnancy is the actual purpose of the statute. Case law demonstrates that the avowed purpose of the statute is the preservation of the virtue of young girls. California's pregnancy prevention argument is a hindsight catchall rationalization futilely used to justify a vestige of bygone attitudes about the proper roles of the sexes.

ARGUMENT

INTRODUCTION

The Petitioner, Michael, comes before this court accused but untried of the offense of "unlawful sexual intercourse" (formerly "statutory rape"[2]) in violation of Section 261.5 of the California Penal Code (hereinafter referred to as "the statute"). The record fairly discloses that Michael was 17½ years of age at the time of the alleged offense (A. 4). The alleged victim, Sharon, age 16½, was only one year and 18 days younger than Michael (A. 4).

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[2]Statutory rape is traditionally defined as sexual intercourse with a female under a certain age. See Comment, *The Constitutionality of Statutory Rape Laws*, (1980) 27 UCLA Law Rev. ..., hereinafter *"Statutory Rape Laws."* (At the time this brief was filed, Issue 3 of 27 UCLA Law Review was in production. References to *Statutory Rape Laws* will therefore be to the manuscript page number.)

If Michael is found to violate the statute, he faces a maximum punishment of three years in the state prison. Cal. Penal Code §§ 264, 18 (Appendix, *infra* p. A-1, 2). Males are therefore subject to severe loss of freedom under the statute while no infirmity whatsoever attaches to females.

This disparity in the treatment of the sexes is perhaps the greatest ever examined by this court. Other instances of discrimination reviewed which did not result in a loss of freedom involved: a presumption of widow's dependence for workers compensation purposes (*Wengler v. Druggists Mutual Ins. Co.* (1980) ..... U.S. ..... 64 L.Ed.2d 107, ... S.Ct.....); the availability of AFDC benefits for families with unemployed mothers (*Califano v. Westcott* (1979) 433 U.S. 76, 61 L.Ed.2d 382, ... S.Ct. .....); the right of an unwed father to veto adoption (*Cahan v. Mohammed* (1979) 441 U.S. 380, 60 L.Ed.2d 297, 99 S.Ct. 1760); a statute providing for alimony payments to wives only (*Orr v. Orr* (1979) 440 U.S. 268, 59 L.Ed.2d 306, 99 S.Ct. 1102); a presumption of dependency for widows for Social Security benefits (*Califano v. Goldfarb* (1977) 430 U.S. 199, 51 L.Ed.2d 270, 97 S.Ct. 1021); the right to buy 3.2% beer[3] (*Craig v. Boren* (1976) 429 U.S. 190, 50 L.Ed.2d 397, 97 S.Ct. 451); Utah's age of majority (*Stanton v. Stanton* (1975) 421 U.S. 7, 43 L.Ed.2d 688, 95 S.Ct. 1373; Social Security survivors benefits (*Weinberger v. Weisenfield* (1975) 420 U.S. 636, 43 L.Ed.2d 514, 95 S.Ct. 1225);

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[3]In *Craig v. Boren*, misdemeanor criminal penalties were applied to the seller, but not to the minor male acquiring 3.2% beer. See 37 Okla. Stat. §§ 163.15, 163.20, 241.

a $500 property tax exemption for widows (*Kahn v. Shevin* (1974) 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1734); a school board's mandatory maternity leave policy (*Cleveland Board of Education v. LaFleur* (1974) 414 U.S. 632, 651, 39 L.Ed.2d 52, 94 S.Ct. 791 (Powell, J., concurring)); uniformed services dependent allotments (*Frontiero v. Richardson* (1973) 411 U.S. 677, 36 L.Ed.2d 583, 93 S.Ct. 1764); the right of unwed fathers to obtain custody of children (*Stanley v. Illinois* (1972) 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct. 1208); and a preference in appointment of probate administrators (*Reed v. Reed* (1971) 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251). Although the disparities in the treatment of the sexes presented in the foregoing cases are each of great importance, the deprivation of the liberty of males for as much as three years found here is a far harsher contrast than is afforded by the previous sex discrimination cases heard by this court.

I

CALIFORNIA'S STATUTORY RAPE LAW REFLECTS AND PERPETUATES INVIDIOUS SEXUAL DISCRIMINATION

Sex discrimination has been predominant throughout the history of this nation. The female has been traditionally viewed as dependent on the male for protection and means and therefore has been considered inferior to males as a class. See, e.g., *Muller v. Oregon* (1908) 208 U.S. 412, 421-422, 52 L.Ed. 551, 556, 28 S.Ct. 324. Conversely, males are

depicted as passionate aggressors[4] who may, if left unchecked, violate their fiduciary duty to protect and provide for women.

The traditional view of the roles of the sexes has formed the basis for the much criticized "double standard." "The fact that female chastity has been valued much more highly than male chastity reflects a set of attitudes known as the sexual double standard. Reduced to its essence, under the sexual double standard premarital sexual activity by the male is considered normal while the same activity by the female is not." *Statutory Rape Laws, supra* n. 2, [Manuscript page 10].

Modern statutory rape laws embrace and perpetuate the traditional stereotypic view of the sexes. Females as old as eighteen are conclusively presumed to be helpless paragons of virtue and incapable of consent. For example:

> [Kentucky's statutory rape law] was designed to protect children and idiots deemed to be incapable in law of consenting. The reason is that the victim is without capacity and discretion to have a proper conception of the character of the offense being committed against her person, or to comprehend its consequences fully, or perhaps to possess strength of will to resist the influence and importunities of the ravisher. That is actually so of an idiot and presumptively so of a child.
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> *Golden v. Commonwealth* (Ky. 1942) 158 S.W.2d 967, 969; 289 Ky. 379

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[4]"The pure woman appears to have become the dominant ideal type in America by 1820. By defining herself as pure while men, nevertheless, remained passionate, a hostility was set up between the sexes which was to have overwhelming psychological and social ramifications in America: man as aggressor, woman as victim." Strong; Sex, Character, and Reform in Society 1830-1920 (1972, University Microfilms) p. 18.

Although the presumption of incapacity may well be valid when applied to a young child, such a presumption is wholly inappropriate when applied to sexually mature teenagers who engage in sexual exploits with their peers.

The California statute is no exception to the pattern of stereotypic thinking which traditionally pervades statutory rape laws. In 1895, the California Supreme Court first articulated the statute's concern for the virtue of womanhood:

> The obvious purpose of [the statute] is the protection of society by protecting from violation the virtue of young and unsophisticated girls. . . . It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it; and the prevention of this, as much as the principal act, must undoubtedly have been the intention of the legislature. . . .
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> *People v. Verdegreen* (1895) 106 Cal. 211, 214, 39 P. 607, 608-609.

See also *People v. Lourintz* (1896) 114 Cal. 628, 630, 46 P. 613. Sixty-nine years later, the California Supreme Court again avowed the statute's solitary purpose:

> [I]n one sense, the lack of consent of the female is not an element of the offense. In a broader sense, however, the lack of consent is deemed to remain an element but the law makes a conclusive presumption of the lack thereof because she is presumed too innnocent and naive to understand the implications and nature of her act. [Citations omitted.] The law's concern with her capacity or lack thereof to so understand is explained in part by a popular conception of the social, moral and personal values which are preserved by the abstinence from sexual indulgence on the part of a

> young woman. An unwise disposition of her sexual favor is deemed to do harm both to herself and the social mores by which the community's conduct patterns are established. Hence the law of statutory rape intervenes in an effort to avoid such a disposition.
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> *People v. Hernandez* (1964) 61 Cal.2d 529, 531, 393 P.2d 673, 674

The court's depiction of the female as "innocent and naive" is a classical characterization of a now inveterate view of the women's role. The expressed concern for the virtue of young women, but not young men, is a simple restatement of the invidious double standard.

In 1975, the California Fourth District Court of Appeal dismissed a constitutional attack on the statute with a reference to the *male* stereotype. "It would be unrealistic to base a conclusion as to the reasonableness of the statute's classification of the protected class upon a belief that girls of the age of the victim are no more likely than boys of the same age to be the objects of the desires and designs of older people of the opposite sex who are on the prowl." *People v. Mackey* (1975) 46 Cal.App.3d 755, 760, cert. den. 423 U.S. 951. The court's characterization of adult males as possessing "desires and designs" is the timeworn image of the passionate, aggressive male.[5]

The perpetuation of traditional sexual stereotypes has been recognized by this court as violative of constitutional equal protection guarantees. In *Frontiero v. Richardson,*

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[5]Compare *Muller v. Oregon, supra,* (1908) 208 U.S. 412, 422, 52 L.Ed. 551, 556, 28 S.Ct. 324, stating: ". . . [H]er physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man."

supra, (1973) 411 U.S. 677, 684, 36 L.Ed.2d 583, 590, 93 S.Ct. 1764, the court acknowledged the negative impact of sex discrimination on this country. "There can be no doubt that our nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." (Fn. omitted.) *Ibid.* As a consequence of traditional sex discrimination, women have been limited in attaining positions of responsibility outside of the home. *Stanton v. Stanton* (1975), *supra,* 421 U.S. 7, 14-15, 43 L.Ed.2d 688, 695, 95 S.Ct. 1373.

The classification scheme reflected in the statute has the effect of reinforcing stereotypes about the proper place of men and women in society. Females who are physically and sexually mature are deemed incapable of making intelligent decisions. "*Because she is a woman* she is deemed inherently less capable of knowing the facts, of controlling her emotions, of weighing the risks and benefits, and of making intelligent choices—in short, she is less responsible for her actions—than her male counterpart." (Original italics.) *Michael M., supra,* 25 Cal.3d 608, 624 [Pet. W. Cert. p. A-22, 23] (Mosk, J., dissenting). By contrast, males are presumed to be the sexual aggressor and therefore absolutely criminally responsible for *every* act of intercourse with females under the age of 18. The result is a highly invidious double standard which is harmful to each of the sexes:

> The sexual double standard perpetuates stereotypes that are unfavorable to both sexes. Statutory rape laws embody these stereotypes by assuming that males will aggressively corrupt and exploit innocent young

> females unless deterred by criminal penalties. A complementary assumption is that females are in need of special legal protection because of their passivity, ignorance, and vulnerability to harmful effects of sexual intercourse, including the informal sanctions. Furthermore, by presuming that underage females, unlike underage males, are incapable of understanding the nature and consequences of sexual intercourse, statutory rape laws embody a stereotype of girls as intellectually deficient and incompetent in a way in which boys are not. [Fns. omitted.]
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> *Statutory Rape Laws, supra* n.2 [Manuscript p. 11]

The discrimination which the statute generates stigmatizes all women, not just those under age. "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *Orr v. Orr* (1979), *supra,* 440 U.S. 268, 283, 59 L.Ed.2d 306, 321, 99 S.Ct. 1102. As long as gender based statutory rape laws exist in this country, at least one poignant remnant of the invidious sexual double standard of the past will impede the attempts of women to attain equality in law and responsibility for their own destinies.

II

THE STATUTE ARBITRARILY HOLDS THE MALE CRIMINALLY CULPABLE EVEN THOUGH THE FEMALE MAY BE OLDER, MORE MATURE, OR HERSELF THE SEXUAL AGGRESSOR

California Penal Code Section 261.5 defines "unlawful sexual intercourse" as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where

the female is under the age of 18 years." Force is not an element of the crime, and consent of the minor female is not a defense. *People v. Johns* (1959) 173 Cal.App.2d 38, 46-47, 343 P.2d 92, 98, *People v. Totman* (1901) 135 Cal. 133, 135, 67 P. 51, 52. The male faces strict liability for transgression of the statute even where "the girl may be the older and more aggressive of the two, and the real seducer . . ." *People v. Derbert* (1903) 138 Cal. 467, 469, 71 P. at 564.

The California Supreme Court has unanimously agreed that the statute creates discriminatory classifications based upon sex.[6] Mr. Justice Richardson writing for the majority below stated "[t]here can be no doubt that Section 261.5 discriminates on the basis of sex because only females may be victims, and only males may violate the section." *Michael M., supra*, 25 Cal.3d 608, 611 [Pet. W. Cert. p. A-2]. The minority agreed stating "[t]he majority concede, as they must, that the statute discriminates on the basis of sex because it punishes males who engage in consensual sexual intercourse with females under the age of 18, but not females who perform the same act with males under the age of 18." *Ibid.* at 616, (Mosk, J., dissenting) [Pet. W. Cert. p. A-10].

The only asserted purpose for the statute was the prevention of teenage pregnancies. "[T]his obviously discriminatory classification scheme is readily justified by an important state interest. . . . [T]he law herein challenged is supported not by mere social convention but by the im-

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[6]By implication, the court has found that the sexes are similarly situated for the purposes of the statute.

mutable physiological fact that it is the female exclusively who can become pregnant." *Michael M., supra*, 25 Cal.3d 608, 611. [Pet. W. Cert. p. A-2, 3]. No other justification for the statute was argued.[7]

The statute's flat presumption of male culpability can not be justified by any trait which is unique to that sex. The operation of the statute is therefore arbitrary and unable to withstand even the lowest level of equal protection scrutiny.

The classifications of the statute use the trait of maleness as a proxy for criminal and moral culpability. In all instances of sexual intercourse, the male is presumed to be the instigator, or at least the only party capable of preventing the act. "The Legislature is well within its power in imposing criminal sanctions against males, alone, because they are the *only* persons who may physiologically cause the result which the law properly seeks to avoid." (Original italics.) *Michael M., supra*, 612, [Pet. W. Cert. p. A-5]. "Maleness" and pregnancy are thereby equated as if the female was only a passive participant.

The court's assumption that males "are the *only* persons" who cause pregnancy ignores that the female may be the instigator or that the decision to engage in sexual conduct may be mutual. "[F]or purposes of equal protection analysis, it probably should be assumed that in the class of cases in which the parties are not equally responsible, the

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[7]Compare *Meloon v. Helgemoe* (1st Cir., 1977) 564 F.2d 602, 605-608, cert. den. 436 U.S. 950, 56 L.Ed.2d 793, 98 S.Ct. 2858; *U.S. v. Hicks* (9th Cir., 4/16/80), ... F.2d ..., 27 Crim.L.Rptr. 2176 (Case No. 78-2534).

woman has been the aggressor about as often as the man." *Caban v. Mohammed* (1979) 441 U.S. 380, 404, 60 L.Ed.2d 297, 315, 99 S.Ct. 1760, (n.8) (Stevens, J., dissenting). The California court's assumption of exclusive male causation is incompatible with the fact that sexual intercourse is ordinarily a mutual act, and completely overlooks all assertive female conduct.

California females under the age of 18 may well be more emotionally and physically mature than their male counterparts and therefore could be in a better position to assume the responsibility for sexual activity. As the California Supreme Court itself stated in 1964:

> The assumption that age alone will bring an understanding of the sexual act to a young woman is of doubtful validity. Both learning from the cultural group to which she is a member and her actual sexual experiences will determine her level of comprehension. The sexually experienced 15-year-old may be far more acutely aware of the implications of sexual intercourse than her sheltered cousin who is beyond the age of consent. A girl who belongs to a group whose members indulge in sexual intercourse at an early age is likely to rapidly acquire an insight into the rewards and penalties of sexual indulgence. Nevertheless, even in circumstances where a girl's actual comprehension contradicts the law's presumption, the male is deemed criminally responsible for the act, although himself young and naive and responding to advances which may have been made to him. [Fn. omitted.]
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> *People v. Hernandez* (1964), *supra,* 61 C.2d 529, 531, 393 P.2d 673, 674

The statute therefore wholly ignores that teenage sexual intercourse may be solicited or encouraged by members of either sex. Males charged with violation of the statute are

precluded from making any showing as to the relative culpability of the female. The nexus between gender and pregnancy prevention is dubious at best, and the universal attribution of responsibility to the male is arbitrary.

The arbitrariness of the statute's classifications can be demonstrated by consideration of a hypothetical statute where the female, but not the male, is deemed criminally responsible for teenage sexual intercourse. Assuming that females as well as males can be deterred by criminal penalties, there is no reason to believe that the hypothetical statute would be any less effective than the existing statute. Females would recognize the criminal implications of their actions and would be accordingly deterred. Femaleness can therefore be used just as effectively as maleness in discouraging teenage sex.

The fact that only females become pregnant actually enhances this argument. If the threat of pregnancy and social sanctions act as a natural deterrent, the additional criminal sanction proposed would further discourage females from engaging in the offensive activity. Criminal sanctions may actually be more effective if applied solely to females because of this additive deterrent value.

The statute uses the trait of maleness *alone* as a proxy for causation of teenage pregnancy. The use of this trait presumes that the male is universally the aggressor and is solely capable of being deterred. In fact, however, the female may be the instigator or at least an equal partner in the decision to engage in sexual intercourse. Since the gender based classifications of the statute do not comport with reality, the universal attribution of guilt to the male only is arbitrary. Such arbitrary use of sex for legis-

lative classifications is violative of the equal protection clause. *Reed v. Reed* (1971) *supra*, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251.

III

THE STATUTE DOES NOT SERVE IMPORTANT GOVERNMENTAL INTERESTS NOR IS IT SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF ANY GOVERNMENTAL INTERESTS

The only governmental interest asserted to justify the gender based classification of the statute is the prevention of teenage pregnancies. While teenage pregnancies may well be a problem of great importance to the State of California, the statute does very little to combat that problem. The connection between the male gender and the causation of teenage pregnancies cannot be demonstrated to meet constitutional criteria.

In order to withstand this constitutional equal protection challenge, the gender based classifications of the statute "must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Orr v. Orr* (1979) *supra*, 440 U.S. 268, 279, 59 L.Ed. 306, 319, 99 S.Ct. 1102, *Craig v. Boren* (1976) *supra*, 429 U.S. 190, 197, 50 L.Ed.2d 397, 407, 97 S.Ct. 451. The burden is on those defending the discrimination to make out the claimed justification. *Wengler v. Druggists Mutual Ins. Co.* (1980) *supra*, ... U.S. ....., 64 L.Ed.2d 107, 116, ... S.Ct. .....; *Califano v. Goldfarb* (1977) *supra*, 430 U.S. 199, 223, 51 L.Ed.2d 270, 286, 197 S.Ct. 1021 (Ste-

vens, J., concurring); *U.S. v. Hicks* (9th Cir., 4/16/80) *supra,* ..... F.2d. ....., 27 Crim.L.Rptr. 2176.

Assuming, arguendo, that the purpose of the statute is indeed the prevention of teenage pregnancy, the respondents cannot meet their burden of demonstrating that the classifications of the statute "serve important governmental objectives" and are "substantially related to the achievement of those objectives." *Craig v. Boren, supra.* The classifications of the statute are not "substantially related to the achievement" of pregnancy prevention since the statute proscribes male sexual activity irrespective of whether pregnancy can result. The statute's failure to exclude all those who utilize birth control devices and those who are otherwise incapable of procreation from its operation results in a grossly overinclusive classification scheme.

Many females under the age of 18 years are too young to conceive. Yet California argues that the statute prohibits intercourse with such females for the sole reason of pregnancy prevention. Certainly sexual activity with prepubescent minors of both sexes is a proper subject of legislative concern. The reason for such concern, however, is not the prevention of pregnancy since prepubescent females, by definition, are too young to conceive.

The inclusion of those who use birth control devices within operation of the statute was rationalized by the California Supreme Court by stating that the legislature was ". . . reluctant to reply . . . upon the doubtful efficacy of contraceptives and the truth of the inevitable claim of

nonemission . . ."[8] *Michael M., supra,* 613 [Pet. W. Cert. p. A-5, 6]. Therefore, the male who has had a vasectomy violates the statute even though it is impossible for his conduct to result in pregnancy. Similarly, the male member of a responsible teenage couple who has sought and obtained birth control counseling and contraceptive devices is inexorably joined in the same category as one who refuses to accept the responsibility for birth control. Even if the male always solicited sexual intercourse, the equation of maleness with causation of teenage pregnancy is incongruent.

California's contention that the gender based statute serves important governmental interests is impeached by the legislative acts of 37 states[9] which have gender neutral

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[8]The majority's statement that modern contraceptives are of "doubtful efficacy" ignores reality and demonstrates the strained reasoning necessary to force the pregnancy prevention justification to fit the statute's classifications. As pointed out in the dissent of Justice Mosk, "certain pregnancy prevention devices (e.g., condoms and contraceptive pills) are both efficacious and widely available to 17 year old men and women. The majority's disregard of this well known fact does not make it any less true." *Michael M., supra,* 25 Cal.3d 601, 620 (n.3) [Pet. W. Cert. p. A-17].

[9]Alaska (Alaska Stat. § 11.41.410(a)(3), (a)(4)); Arizona (Ariz. Rev. Stat. Ann. § 13-1405); Arkansas (Ark. Stat. Ann. § 41-1803(1)(c)); Colorado (Colo. Rev. Stat. § 18-3-403(1)(e)); Connecticut (Conn. Gen. Stat. Ann. § 53a-71(a)(1)); Florida (Fla. Stat. Ann. § 794.05); Hawaii (Hawaii Rev. Stat. §§ 707-730(1)(b), 707-731(b)); Illinois (Ill. Ann. Stat. ch. 38 §§ 11-5, 11-6); Indiana (Ind. Code Ann. § 35-42-4-3); Iowa (Iowa Code Ann. §§ 709.3, 709.4); Kansas (Kan. Stat. Ann. § 21-3503); Kentucky (Ky. Rev. Stat. §§ 510.040; 510.050); Maine (Me. Rev. Stat. Ann. tit. 17A, §§ 252,

"statutory rape" laws. Certainly, the prevention of teenage pregnancy is a compelling interest in every state. The high incidence of sexual activity among the nation's minors has been the subject of this court's judicial notice. *Carey v. Population Services International* (1977) 431 U.S. 678, 696, 52 L.Ed.2d 675, 692, 97 S.Ct. 2010. The fact that gender neutral statutes exist in over seventy percent of the states, however, demonstrates that California's gender based statute is not necessary to further the legitimate interests of that state.

Nor is California's concern with the sexual activity of older teenagers shared by her sister states. The facts alleged in the Information (A. 7, 8) do not constitute an

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254); Maryland (Md. Ann. Code art. 27, §§ 463, 464A); Massachusetts (Mass. Ann. Laws ch. 265 § 23); Michigan (Mich. Stat. Ann. §§ 28.788(2)(1)(a), 28.788(4)(1)(a)); Minnesota (Minn. Stat. Ann. §§ 609.342-609.345); Missouri (Mo. Ann. Stat. § 559.260; Montana (Mont. Rev. Codes Ann. §§ 94-5-501 to 94-5-503); Nebraska, (Neb. Rev. Stat. § 28-408.03(1)(c)); New Hampshire (N.H. Rev. Stat. Ann. §§ 632-A2 to 632-A3); New Jersey (N.J. Rev. Stat. § 2a:138-1); New Mexico (N.M. Stat. Ann. §§ 40A-9-21, 40A-9-23); North Carolina (N.C. Gen. Stat. § 14-28-2(a)(2)); North Dakota (N.D. Cent. Code §§ 12.1-20-03, 12.1-20-05, 12.1-20-07); (Ohio Rev. Code Ann. §§ 2907.02, 2907:04); Pennsylvania (Pa. Cons. Stat. Ann. tit. 18, § 3122); Rhode Island (R.I. Gen. Laws § 11-37-2); South Carolina (S.C. Code § 16-3-655); South Dakota (S.D. Comp. Laws Ann. § 22-22-1); Tennessee (Tenn. Code Ann. §§ 39-3703(3), 39-3705(4)); Utah (Utah Code Ann. §§ 76-5-401, 76-5-402(2); Vermont (Vt. Stat. Ann. tit. 13, § 3252); Washington (Wash. Rev. Code §§ 9A.44.070, .078, .079; West Virginia (W. Va. Code §§ 61-8B-3(3), 61-8B-5(a)(2)); Wisconsin (Wis. Stat. Ann. § 940.225(1)); Wyoming (Wyo. Stat. §§ 6-63.3, 6-63.4).

offense in 42 of the states[10] and the District of Columbia.[11] Only four states,[12] including California, could prosecute Michael under the facts alleged. If Sharon were of "previous chaste character" Michael would be subject to

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[10]Alabama (Ala. Code tit. 14, § 399); Alaska (Alaska Stat. § 11.15.120); Arkansas (Ark. Stat. §§ 41-1803, 41-1804); Colorado (Colo. Rev. Stat. § 18-3-403); Connecticut (Conn. Gen. Stat. §§ 53a-71); Delaware (Del. Code tit. 11, §§ 761-762(a)); Georgia (Ga. Code § 26-2018); Hawaii (Hawaii Rev. Stat. §§ 707-731(1)(b)); Indiana (Ind. Code § 35-42-4-3); Iowa (Iowa Code §§ 709.3, 709.4); Kansas (Kan. Stat. Ann. § 21-3503; Kentucky (Ky. Rev. Stat. §§ 510.040, .050); Louisiana (La. Rev. Stat. §§ 14.42, 14.80); Maine (Me. Rev. Stat. Ann. tit. 17A, §§ 252, 254); Maryland (Md. Ann. Code art. 27, §§ 463, 464A); Massachusetts (Mass. Gen. Laws ch. 265, § 23); Michigan (Mich. Stat. Ann. §§ 28.788(2)(1)(a), 28.788(4)(1)(a)); Minnesota (Minn. Stat. Ann. §§ 609.342-609.345); Missouri (Mo. Stat. Ann. § 559.260); Montana (Mont. Rev. Code §§ 94-5-501 to 94-5-503); Nebraska (Neb. Rev. Stat. § 28-408.03(1)(c)); Nevada (Nev. Rev. Stat. § 200.365); New Hampshire (N.H. Rev. Stat. §§ 632-A2 to 632-A3); New Jersey (N.J. Rev. Stat. § 2a:138-1); New Mexico (N.M. Stat. Ann. §§ 40A-9-21, 40A-9-23); New York (N.Y. Penal Law § 130.25); North Carolina (N.C. Gen. Stat. § 14-27.2(a)(2)); North Dakota (N.D. Cent. Code §§ 12.1-20-03, 12.1-20-05, 12.1-20-07); Ohio (Ohio Rev. Code Ann. §§ 2907.02, 2907.04); Oregon (Or. Rev. Stat. §§ 163.315, 163.345, 163.415, 163.435); Pennsylvania (Pa. Cons. Stat. tit. 18 § 3122); Rhode Island (R.I. Gen. Laws § 11-37-2); South Carolina (S.C. Code § 16-3-655); South Dakota (S.D. Comp. Laws Ann. § 22-22-1); Tennessee (Tenn. Code. Ann. §§ 39-3703(3), 39-3705(4)); Texas (Tex. Penal Code § 21.09); Utah (Utah Code Ann. §§ 76-5-401, 76-5-402(2)); Vermont (Vt. Stat. Ann. tit. 13 § 1352); Virginia (Va. Code § 18.2-61, -63); Washington (Wash. Rev. Code §§ 9A.44.070, .078, .079); West Virginia (W. Va. Code §§ 61-8B-3(3), 61-8B-5(a)(2); Wyoming (Wyo. Stat. §§ 6-63.3 to 6-63.4).

[11]D.C. Code § 22-2801.

[12]Arizona (Ariz. Rev. Stat. Ann. § 13-1405); California (Cal. Penal Code § 261.5); Idaho (Idaho Code § 18-6101(1)); Illinois (Ill. Rev. Stat. ch. 38, §§ 11-5, 11-6).

prosecution in two additional states.[13] Sharon herself, however, would be subject to prosecution in two states[14] for engaging in consensual intercourse with Michael. Sharon could also be prosecuted in one more state[15] if Michael was of "previous chaste character." The irony of Michael's prosecution is heightened by California Civil Code Section 34.5 which gives both Michael and Sharon a statutory right to obtain birth control devices without parental consent.

The utility of the statute for its asserted purpose is also doubtful because it is rarely invoked. State statistics show that the adult arrest rate for violation of the statute is low and declining:

Year	Arrests
1969	979
1970	848
1971	569
1972	486
1973	466
1974	395
1975	475
1976	336
1977	324
1978	274

Cal. Dept. of Justice, Bureau of Criminal Statistics, Division of Law Enforcement, Criminal Justice Profile (1978), p. 6. The number of juvenile[16] arrests for violation of the

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[13]Florida (Fla. Stat. §§ 794.011, 794.05); Mississippi (Miss. Code Ann. §§ 97-3-65, 97-3-67).

[14]Arizona (Ariz. Rev. Stat. Ann. § 13-1405); Illinois (Ill. Rev. Stat. ch. 38, §§ 11-5, 11-6).

[15]Florida (Fla. Stat. §§ 794.011, 794.05).

[16]A juvenile is, for arrest purposes, a person under the age of 18. Cal. Welf. & Inst. Code §§ 200, et seq., Cal. Civil Code § 25.

statute is apparently not significant enough to be reported. *Ibid.*, p. 8.

When the low arrest rate is compared with the high incidence of sexual activity among minors, the absurdity of California's position becomes apparent. For example, it has been estimated that nationally 45% of all adolescent females have had sexual intercourse. Sorensen, Adolescent Sexuality in Contemporary America (World Publishing, 1973), p. 122. The average frequency of intercourse for all adolescent non-virgins was reported to be 8.0 times per month. *Ibid.*, p. 124. Applying these statistics to California's 1975 female population for ages 15, 16 and 17, (approximately 840,000[17]), yields the conclusion that California's minor females participated in more than 36,000,000 acts of sexual intercourse in 1975. Yet only 475 arrests are reported for that year. California has therefore arrested a scant .00131% of the culprits. The statute's deterrent value is highly dubious when the chances of apprehension are so infinitesimal.

The low rate of prosecution under the statute is no doubt due, in large part, to the private and consensual nature of teenage sexual contacts. Prosecution under the statute is highly unlikely since the only witnesses are unwilling to report the offense in almost every case. The fact that the crime is so difficult to detect and prosecute further evidences the statute's failure to substantially further its alleged purpose.

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[17]Population Projection for California Counties 1975-2020 with Age/Sex Detail to 2000, Cal. Dept. of Finance, Sacramento (1977).

California Penal Code Section 261.5 is colossally over-inclusive. The contention that the statute serves important interests is impugned by the fact that arrests for the statute's violation are a rarity and by the fact that only a small minority of the states now utilize the type of gender based classifications characteristic of the statute. Since California cannot meet its burden of showing that the statute serves important governmental objectives and is substantially related to the achievement of those objectives, the statute fails to meet equal protection criteria.

IV

PREVENTION OF TEENAGE PREGNANCIES IS NOT THE PURPOSE OF THE STATUTE

The California Supreme Court has determined that the purpose of the statute challenged is the prevention of teenage pregnancies. *Michael M., supra,* 25 Cal.3d 608, 611-612. [Pet. W. Cert. p. A-2, 5]. This determination is, however, wholly unsupported either by the statute's legislative history or by any judicial interpretation. All evidence concerning the purpose of the statute demonstrates that it exists to protect the virtue of young females. Such a purpose is not sufficient to satisfy the constitutional requirements for gender based legislation.

Although the views of the California Supreme Court should be given "careful consideration," this court must make its own independent determination as to the purposes of the statute when constitutional rights are in issue. *Reitman v. Mulkey* (1971) 387 U.S. 369, 373-374, 18 L.Ed.2d 830, 834, 87 S.Ct. 1627, *McGowan v. Maryland* (1961) 366 U.S. 420, 449, 6 L.Ed.2d 393, 413, 81 S.Ct. 1101.

The history and prehistory of the statute[18] are succinctly set forth in the dissent of Justice Mosk. *Michael M., supra,* 25 Cal.3d 608, 617-618 [Pet. W. Cert. p. A-12, 13].[19] At the statute's inception in 1850, sexual intercourse was prohibited with females under the age of 10. *Ibid.* Since the age of puberty is much higher than nine, it is apparent that pregnancy prevention could not have motivated the statute's enactment at its outset.

Between 1889 and 1913 the age of consent was raised incrementally to age 18. *Ibid.* Although the legislative history is silent as to the motivation of California's lawmakers in advancing the age, the California courts were outspoken in proclaiming the statute's purpose as the protection of female virtue. See *People v. Verdegreen* (1895) *supra,* 106 Cal. 211, 214, 39 P. 607 (protection from violation of "the virtue of young and unsophisticated girls"); *People v. Lourintz* (1896) 114 Cal. 682, 630, 46 P. 613, (same); *People v. Ratz* (1896) 115 Cal. 132, 135, 46 P. 915, 916 (purpose "obvious" but "crime too infamous to bear discussion"); *People v. Edwards* (1912) 163 Cal. 752, 757, 127 P. 58 (female "incapable of giving legal consent because of tender years"); *People v. Courtney* (1960) 180 Cal.App.2d 61 (purpose is "to protect young girls from illicit intercourse"—applied to married minor female); *People v. Hernandez* (1964), *supra,* 61 Cal.2d 529, 531, 393 P.2d 673 (female "too innocent and naive to understand the implications and nature of her act"); *People v. Cald-*

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[18]The statute was originally codified as subdivision 1 of California Penal Code Section 261. In 1970, it was recodified in its present form. Cal. Stats. 1970, ch. 1301, § 2, p. 2406.

[19]See also *Statutory Rape Laws, supra,* n.2 [Manuscript p. 6-8].

well (1967) 255 Cal.App.2d 229, 230 (protection from illicit sexual intercourse—applied to married minor female); *People v. Mackey* (1975) *supra*, 46 Cal.App.3d 755, 760 (females more likely "to be the objects of desires and designs of older people"). Throughout the 130 year history of the statute, prevention of pregnancy has never been mentioned by a California court as a purpose for the statute. The assertion that pregnancy prevention is the purpose of the statute is therefore wholly without historical support.

The application of the statute itself is far broader than necessary to simply prevent pregnancy.[20] The failure to exclude prepubescent females and couples who use reliable birth control devices evidences an intent to forbid the act of sexual intercourse itself. The proscription of acts which do not result in pregnancy demonstrates that the statute has a broader purpose—the wholesale prohibition of sex with young women.

The California Supreme Court's bald assertion as to the purposes of this gender based statute should not be accepted as a matter of course. This court should be especially wary when the child bearing capacity of women is used to justify a disparity in the treatment of the sexes:

> Certainly the fact that women and not men bear children is a fundamental distinguishing characteristic of the two sexes and as such it can be the basis for some gender based legislation; but there is a danger that the very uniqueness of this characteristic

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[20]See *supra*, pp. 18-19.

> makes it an available hindsight catchall rationalization for laws that were promulgated with totally different purposes in mind.
>
> *Meloon v. Helgemoe, supra,* (1st Cir. 1977) 564 F.2d 602, 607

In view of the overbreadth of the statute and the total lack of historical evidence supporting the asserted purpose, California's pregnancy prevention rationale must be considered a "hindsight catchall rationalization" which should not be accepted as a justification for the statute.

CONCLUSION

On the basis of the foregoing, the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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APPENDIX

Appendix

Constitutional and Statutory Provisions Involved

California Penal Code § 261.5:

Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.

California Penal Code § 264 (effective until January 1, 1980):

Rape, as defined in Section 261, is punishable by imprisonment in the state prison for three, six, or eight years. *Unlawful sexual intercourse, as defined in Section 261.5, is punishable either by imprisonment in the county jail for not more than one year or in the state prison,* and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison, provided, that when the defendant pleads guilty to an offense under Section 261.5, the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison. (emphasis supplied)

California Penal Code § 264 (operative January 1, 1980):

Rape, as defined in Section 261, is punishable by imprisonment in the state prison for three, six, or eight years. Rape as defined in Section 262, is punishable either by imprisonment in the county jail for not more than one year or in the state prison for three, six, or eight years. *Unlawful sexual intercourse, as defined in Section 261.5, is punishable either by imprisonment in the county jail for not more than one year or in the state prison,* and in

such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison; provided, that when the defendant pleads guilty to an offense under Section 261.5 the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison. (emphasis supplied)

California Penal Code § 18:

Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years; provided, however, every offense which is prescribed by any law of the state to be a felony punishable by imprisonment in any of the state prisons or by a fine, but without an alternate sentence to the county jail, may be punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both.

Section 1 of the Fourteenth Amendment of the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U. S.
FILED
SEP 5 1980
MICHAEL RODAK, JR., CLERK

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BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

Summary of Argument.

The gender-based classification in California Penal Code section 261.5 serves the important governmental interest of deterring teenage pregnancies. The widespread problem of teenage pregnancy is a matter of great concern to the State of California in light of the disastrous physical and social consequences which are suffered by the adolescent mother and her child.

The California Supreme Court's conclusion that pregnancy prevention is the legislative purpose supporting the statute should be accepted as a correct analysis of state law. Earlier pronouncements of legislative purpose were devoid

of evidence of express legislative intent and therefore not entitled to great weight. Legislative purpose should be analyzed in light of presently identifiable governmental interests, rather than turning upon difficult questions of legislative history of statutes passed in earlier centuries. The California Legislature's subsequent refusal to enact a gender-neutral statute, in any event, is legislative acceptance of the purposes set forth by the California Supreme Court.

The classification in the statute serves the important governmental interest of pregnancy prevention by protecting the victim from the very act necessary to conception. Because virtually all of the significant harmful consequences of teenage pregnancy fall upon the young female, the Legislature has rationally elected to provide punishment for the participant who, by nature, suffers none of the burdens of his conduct. Viewed as part of a scheme of protection for all minors, California Penal Code section 261.5 rationally focuses on the fact the sexes are not similarly situated for purposes of the statute.

The statutory classification is not overinclusive although use of birth control devices or infertility do not constitute defenses, because the risk of teenage pregnancy and its frequent occurrance alone are sufficient to justify the statute. Petitioner has never alleged himself to have used birth control devices or to be infertile, so he lacks standing to challenge the statute on the basis those conditions must constitute a defense. The state is not constitutionally compelled to adopt a gender-neutral statute, although some states have elected to do so, and statutes similar to California's unlawful sexual intercourse provision have repeatedly been upheld.

The unique potential for physical harm to the pre-pubescent or physically immature female also justifies the statutory classification. Young females are uniquely subject to

physical injury from sexual intercourse, and a statute which recognizes this fact serves important governmental interests.

The statute is constitutionally applied to petitioner, who utilized his apparent physical superiority to force the victim to submit to intercourse. There is no evidence that the statute is ever applied in a situation where an older minor female is the sexual aggressor in an act of intercourse with a younger boy, and because that is not the factual setting of the instant case, petitioner lacks standing to challenge the statute as applied in that hypothetical situation. The statute is commonly employed in situations involving force, prostitution, pornography or coercion due to status relationships, and the state's interest in these situations is apparent.

ARGUMENT.

INTRODUCTION.

California Penal Code section 261.5 defines the offense of unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." (Cal. Stats. 1970, ch. 1301, §2, p. 2406; Cal. Pen. Code §261.5.) Although challenged by petitioner on equal protection grounds, the statute is in fact a valid exercise of legislative prerogative in assessing the physical, social and psychological differences between the sexes. In view of the undeniable disparity in the situations of minor males and females in regard to sexual intercourse, California Penal Code section 261.5 represents a rational and justifiable legislative response to demonstrable problems in the state.

California Penal Code section 261.5 is uniquely different from the gender based classifications previously considered by the Court. The classifications in earlier cases have generally been involved in an economic setting. (See, *e.g.*, *Wengler v. Druggists Mutual Ins. Co.* (1980) .... U.S. .... , 64 L.Ed.2d 107, 100 S.Ct. 1540; *Orr v. Orr* (1980) 440 U.S. 268, 59 L.Ed.2d 306, 99 S.Ct. 1102; *Califano v. Goldfarb* (1977) 430 U.S. 199, 51 L.Ed.2d 270, 97 S.Ct. 1021.) The recognition of the biological distinctions between minor males and females found in California's unlawful sexual intercourse provision is not based upon archaic stereotypes, but rather is founded upon the promoting of important and compelling governmental interests.

I.

CALIFORNIA PENAL CODE SECTION 261.5 IS FOUNDED UPON THE IMPORTANT GOVERNMENTAL OBJECTIVE OF PREVENTING TEENAGE PREGNANCY.

The gender-based classification scheme in California Penal Code section 261.5, which affords protection to fe-

males under the age of 18 years, is valid if it serves "important governmental objectives" and is "substantially related to the achievement of those objectives." (*Craig v. Boren* (1976) 429 U.S. 190, 197, 50 L.Ed.2d 397, 97 S.Ct. 451.) The principal governmental objective supporting California's unlawful sexual intercourse provision is the prevention of pregnancy in unwed females aged 17 years and under.

A. The Prevention of Teenage Pregnancy as an Important Governmental Interest.

While petitioner concedes the compelling governmental interest in prevention of teenage pregnancy (Brief of Petnr., p. 20), it is nonetheless important to set forth the scope of the problem, which places the statutory classification in proper perspective. The Supreme Court of California below noted the severity of the problem in California, as demonstrated in figures from 1971 through 1976 indicating that 83.6% of the 4,860 children born to girls under the age of 15 in California were illegitimate. For children born to girls between 15 and 17 years of age in the same period, 51% were out-of-wedlock. (*Michael M. v. Superior Court* (Cal. 1979) 25 Cal.3d 608, 611, 601 P.2d 572, 574.) The Court further observed that teenagers utilized a disproportionate amount of abortion services, accounting for 34.7% of all legal abortions in California in 1976, while accounting for only 21% of the pregnancies. (*Ibid.*) Finally, the Court recognized the increased medical and social problems attendant to teenage pregnancy. (*Id.*, at pp. 611-612.)

Unintended teenage pregnancy is now generally recognized as one of America's critical personal and social problems. ("The Legitimacy Status of First Births to U.S. Women Aged 15-24, 1939-1978," 12 Family Planning Perspectives, p. 19 (Jan./Feb. 1980).) Statistics indicate that young mothers between the age of 15 and 19 are twice as

likely to die from hemorrhage and miscarriage as are mothers in their 20's, while the death rate from complications of pregnancy and birth is 60% higher among mothers under 15. (Francke, *The Ambivalence of Abortion*, p. 183 (Random House 1978).) Because the teenage mother's body is still growing and immature, she is more likely than any other age group to suffer from toxemia (blood poisoning), anemia, premature labor, prolonged labor, and premature end to growth of arms and legs. ("Teenage Pregnancy: The Problem Worsens," August 1978 Bulletin of California Woman, issued by the California Commission on the Status of Women.)

The offspring of teenage women are no better off. Babies born to 15-year-old mothers are twice as likely to die as babies born to mothers between the ages of 20-24. (Francke, *The Ambivalence of Abortion, supra*, at pp. 183-184.)

Severe social ramifications as well befall the teenage mother. Eight out of ten who first become mothers at age seventeen or younger never complete high school. ("Teenage Pregnancy, Everybody's Problem," p. 2, DHEW Publication No. (HSA) 77-5619.) Because of educational deficiencies and the responsibility of parenthood, employment opportunities are limited. (10 Family Planning Perspectives, p. 223 (July/Aug. 1978),) It is estimated that 60% of adolescent mothers aged 15 to 17 are on welfare within two to five years of the birth of their children. ("Teenage Pregnancy, Everybody's Problem," *supra*, at pp. 3-4.) Because forced marriages tend to be unstable, there is a divorce rate three to four times higher for those married in their teens than those married in later ages. (*Id.*, at p. 4.) Children of adolescent parents are more likely to come from single parent homes, score lower on aptitude tests and to repeat their parents in early childbearing. ("Children as Well as Adolescent Parents Pay a Price for Parent's Precocious Child-

bearing," Family Planning Perspectives, pp. 198-199 (May/June 1979).) Clearly the problem of unwanted teenage pregnancy is one of monumental proportions and was properly perceived by the Supreme Court of California.

B. The Legislative Purpose Is the Prevention of Pregnancy.

Petitioner and amici curiae American Civil Liberties Union urge the Court to reject the California Supreme Court's conclusion that the legislative purpose behind California Penal Code section 261.5 is the prevention of pregnancy in unwed teenagers. (Brief of the Petnr., pp. 24-25; Brief of Amici Curiae Amer. Civ. Liberties Union, pp. 12-14.) Both parties contend that the purpose of the statute is to preserve the virtue of young girls, which constitutes an impermissible justification for the statute.

The California Supreme Court is the ultimate arbiter of California law, and its determination of statutory intent should be given careful consideration. (*Reitman v. Mulkey* (1967) 387 U.S. 369, 376-379, 18 L.Ed.2d 830, 87 S.Ct. 1627.) It is true that the Court has examined and rejected a state's highest court's reasoning on legislative purpose. (*Eisenstadt v. Baird* (1972) 405 U.S. 438, 447-452, 31 L.Ed.2d 349, 92 S.Ct. 1029.) More recently the Court has commented that it need not in equal protection cases accept at face value assertions of legislative purpose "when an examination of the legislative scheme and its history demonstrates that the asserted purpose *could not* have been a goal of the legislation." (Emphasis added, *Weinberger v. Wiesenfeld* (1975) 420 U.S. 636, 648 fn.16, 43 L.Ed.2d 514, 95 S.Ct. 1225.) Because it cannot be shown the pregnancy prevention "could not" be a goal of the Legislature in enacting California Penal Code Section 261.5, the Court

should defer to the judgment of the California Supreme Court on the matter.

The offense of statutory rape can be traced to the Statutes of Winchester in 1275 which established the age of consent at 12 years. (3 Edw. I, ch. 13.) The age was lowered to 10 by Parliament (18 Eliz. ch. 7) in 1576. (4 Blackstone Commentaries 212; *State v. Rundlett* (Me. 1978) 391 A.2d 815, 819 fn.14.) The offense of statutory rape was part of the first Penal statute in California (Cal. Stats. 1859, ch. 99, §47, p. 234), and was subsequently codified in former California Penal Code section 261(1) in 1872. The age of consent was initially established at 10, but was raised to 14 in 1889 (Cal. Stats. 1889, ch. 191, §1, p. 223), to 16 in 1897 (Cal. Stats. 1897, ch. 139, §1, p. 201) and finally to 18 in 1913 (Cal. Stats. 1913, ch. 122, §1, p. 212.) In 1970 the California Legislature removed the offense from the rape provision of California Penal Code section 261, and enacted section 261.5, defining the offense of "unlawful sexual intercourse." (Cal. Stats. 1970, ch. 1301, §2, p. 2406.)[1] None of these enactments contain express statements of the legislative purpose.

The previous declarations of legislative intent by the Supreme Court of California, upon which petitioner relies, are

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[1]Petitioner is therefore before the Court seeking to invalidate a statute with a historical precedent of 700 years. In addressing a contention that 18 United States Code section 2421, commonly known as the Mann Act, was unconstitutional on the ground it contained an impermissible gender-based classification in that only females are protected, the Eighth Circuit commented that "[i]t is rather late in the history of the Mann Act to still be contending for its unconstitutionality." (*United States v. Garrett* (8th Cir. 1975) 521 F.2d 444, 446.) Certainly if it is "rather late" to be challenging the validity of the Mann Act, in the words of the Court in *Garrett*, where there had been "over 60 years since its enactment" (*ibid.*), it follows that petitioner's challenge to California Penal Code section 261.5, with its roots traced to the 13th Century, should similarly be rejected.

totally devoid of reference to express legislative intent. (See *People v. Hernandez* (Cal. 1964) 61 Cal.2d 529, 531, 393 P.2d 673; *People v. Verdegreen* (Cal. 1895) 106 Cal. 211, 214, 39 P.2d 607.) Thus the prior California Supreme Court holdings that the legislative purpose was to protect the virtue of the young female are not persuasive in view of the absence of any citation to actual legislative intent.

Moreover, a logical inference can be drawn that pregnancy prevention was a concern of the Legislature as it increased the age of consent from 10 years to 14, 16, and finally 18 years. The most recent legislative change, the abolition of the offense of statutory rape found in former California Penal Code section 261, and the creation of the offense of unlawful sexual intercourse in 1970, came at a time when teenage pregnancy was a problem of well known and substantial proportion in California. It cannot be assumed that the California Legislature did not have the problem of pregnancy prevention in mind at the time California Penal Code section 261.5 was enacted.

The prior holdings of the California Supreme Court are not only devoid of support in legislative history, but were probably incorrect in light of the consistent absence of a chastity requirement in California's prior or existing statute. In those states which made chastity an element of statutory rape, the legislative purpose may be assumed to include preserving the virtue of young girls. The absence of a chastity qualifier indicates that the state was concerned with an objective other than preserving the virtue of underage females. (*State v. Rundlett, supra*, 391 A.2d at p. 820.)

In view of the questionable merit of the statements of legislative intent in early California Supreme Court opinions, the Court below was free to address the issue anew. Indeed, the state's highest court may not only interpret its statutes, but it may also *reinterpret* state law. (*Garner v.*

Louisiana (1961) 368 U.S. 157, 169, 7 L.Ed.2d 207, 82 S.Ct. 248.) The power to reinterpret should include the right to reassess legislative purpose in light of conditions now present.[2]

The intermediate level of equal protection analysis should not be viewed as requiring proof of a legislative purpose revealing an important governmental interest at the time of enactment. The more apt inquiry is whether the statutory classification under attack serves an identifiable important governmental interest at the present time. Certainly where there is a present identifiable important governmental interest which supports a classification scheme, it would be anomalous to strike down a statute on the basis that at the time of enactment a different legislative purpose existed.

This view was cogently and expressly embraced in the concurring opinion in *Rundlett v. Oliver* (1st Cir. 1979) 607 F.2d 495, 504 fn.3 (Campbell, Cir. Judge, conc.) in which Maine's former statutory rape law was upheld. The concurring opinion noted that statutes should not be tainted simply by the fact they were enacted in earlier times when a different morality was acceptable. The more apt inquiry is "whether in today's world we can discern a substantial relationship between the statutory classification and a governmental objective important enough to sustain such a gender-based classification." (*Ibid.*) While history may be important in a court's judgment, "far more important is a court's perception of the world around it, and the current interests reasonably to be served." (*Ibid.*) In view of petitioner's concession that "the prevention of teenage pregnancy is a compelling interest in every state" (Brief of

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[2]The power of the state court in this regard is no different from this Court's power to reinterpret the Constitution and to overrule its prior erroneous holdings. (See *Edelman v. Jordan* (1974) 415 U.S. 651, 671, 39 L.Ed.2d 662, 94 S.Ct. 1347.)

Petnr., at p. 20), respondent submits that the crucial inquiry in the instant case is not the historical underpinning of the statute, but rather whether the statutory classification is substantially related to presently identifiable governmental interests.

Assuming some indication of current legislative purpose is necessary, respondent submits that it can be found in recent action by the California Legislature. Following the declaration of legislative purpose by the Supreme Court of California below, bills were introduced in the California Assembly and Senate which would have in part amended California Penal Code section 261.5 to render it gender-neutral. (Assem. Bill 1588, Cal. Leg., 1979-1980 Reg. Sess.; Sen. Bill 2045, Cal. Leg., 1979-1980 Reg. Sess.) Neither bill met with success in the California Legislature and both are considered dead. (See Cal. Assem. Weekly History, July 17, 1980, p. 327; Cal. Sen. Weekly History, July 12, 1980, p. 622.) In the same legislative session, California's forcible rape provision was amended to be gender-neutral. (Cal. Stats. 1979, ch. 994, p. .... , §1; Cal. Pen. Code §261.)

Respondent submits that defeat of the proposed amendments to California's unlawful sexual intercourse provision, in the same session in which California's forcible rape law was made gender-neutral, amounts to a legislative declaration of acceptance of the purposes most recently stated by the Supreme Court of California in upholding the statutory classification. The California Legislature is presumed to be aware of existing judicial decisions. (*Kusior v. Silver* (Cal. 1969) 54 Cal.2d 603, 618, 354 P.2d 657.) Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed in California that the Legislature is aware of the judicial construction and approves of it. (*People v. Hall-*

ner (Cal. 1954) 43 Cal.2d 715, 719, 277 P.2d 393; *People v. Fox* (Cal. 1977) 73 Cal.App.3d 178, 181, 140 Cal.Rptr. 615.) Thus if a statement of legislative purpose is necessary, it can be found in the California Legislature's implied approval of the reasoning of the Supreme Court of California.

In addition to its recent acceptance of the reasoning of the Supreme Court of California, the California Legislature in 1967 recognized the relationship between the state's former statutory rape provision and the need to deter teenage pregnancy in adopting the California Therapeutic Abortion Act. (Cal. Stats. 1967, ch. 327, p. 1535, §1; Cal. Health and Saf. Code §25950 et. seq.) Under the Therapeutic Abortion Act, an abortion was a matter of right for those statutory rape victims under the age of 15 years, and was permissible for those victims 15 years of age and older. (Cal. Health & Saf. Code §25952, subds. (a)-(c); former Cal. Pen. Code §261, subd. (1).) The provisions of the Therapeutic Abortion Act reflect a legislative acceptance of pregnancy prevention as a purpose of the former statutory rape provision, by allowing for abortions where pregnancy resulted from a violation of former California Penal Code section 261(1). The legislative approach was intended to deter pregnancies through the statutory rape law, but if the section 261(1). The legislative approach was intended to available. It is reasonable to conclude that the California Legislature perceives pregnancy prevention as a purpose of its statutory rape provision in view of the enactment of the Therapeutic Abortion Act of 1967.

The California Supreme Court below, cognizant of the gravity of the problem of teenage pregnancy, was free to infer that the current legislative purpose supporting California Penal Code section 261.5 was the prohibition of the act which is a condition precedent to the pregnancy itself. There is certainly no indication that the California Legis-

lature disagrees with this reasoning. Respondent urges the Court to afford the determination of the Supreme Court of California the "careful consideration" it deserves, and to adopt its recognition of pregnancy prevention as the legislative purpose supporting the enactment of California Penal Code section 261.5.

C. The Classification Scheme Is Substantially Related to the Prevention of Teenage Pregnancy.

There are disastrous physical, social and psychological effects which fall exclusively upon the teenage mother. No similar demonstrable harm is suffered by the father, whether he is pre- or post-adolescent. Recognizing the totally disparate consequences which befall the unwed teenage mother, the California Legislature has sought to protect the underage female, the victim, from these consequences by prohibiting any male from engaging in the act necessary for conception. The allocation of liability in the male participant in an act of sexual intercourse is "substantially related" to the undeniable dissimilarity in the consequences of pregnancy to the minor female victim and the male participant. (See *State v. Rundlett, supra,* 391 A.2d at p. 822; *State v. Gray* (Ariz. 1979) 122 Ariz. 445, 447, 595 P.2d 990, 992.)

This Court has recognized that where the sexes are not similarly situated there is no constitutional prohibition to a classification based upon gender. (*Parham v. Hughes* (1979) 441 U.S. 347, 354-355, 60 L.Ed.2d 269, 99 S.Ct. 1742 (Opn. of Stewart, J.); *Schlesinger v. Ballard* (1975) 419 U.S. 498, 508-509, 42 L.Ed.2d 610, 95 S.Ct. 572.) Because only the minor female can become pregnant, the sexes are not similarly situated for purposes of statutory rape laws, and the special protection afforded the victim is not violative of the concept of equal protection. (*People v. Salinas* (Colo. 1976) 191 Colo. 171, 174, 551 P.2d 703,

705-706; *State v. Drake* (Iowa 1974) 219 N.W.2d 492, 496.) Once it is accepted that the purpose of protecting the minor female from sexual intercourse is valid, "it inevitably follows that the curbs adopted to accomplish that purpose can only be imposed against males because they are the only persons who may inflict the injury which the law seeks to avoid." (*State v. Drake, supra,* 219 N.W.2d at p. 496; see also *In re Interest of J.D.G.* (Mo. 1973) 498 S.W.2d 786, 793.)

California has a policy of protecting all minors from harmful sexual contacts. (See Cal. Pen. Code §272 (contributing to the delinquency of a minor); Cal. Pen. Code §288 (lewd and lascivious conduct on the body of a child under the age of 14); Cal. Pen. Code §647a (annoying or molesting any child under the age of 18.) This protection has been specifically applied to protect minor males from heterosexual contacts with adult women. (See *People v. Lowell* (1946) 77 Cal.App.2d 341, 343-345, 175 P.2d 846.) California Penal Code section 261.5 is therefore merely one provision in a comprehensive legislative scheme which protects all minors from sexual abuse, but which gives special recognition to the unique nature of the potential harm resulting from sexual intercourse with a female under the age of 18 years. The approach of the California Legislature is consistent with its power to address itself to what it perceives to be the most accute phase of a problem. (*Williamson v. Lee Optical Co.* (1955) 384 U.S. 483, 489, 99 L.Ed. 563, 75 S.Ct. 461.)

The California Legislature could also rationally conclude that while the teenage female is subject to the natural deterrent of fear of pregnancy, the male has no similar fear to deter his participation in sexual intercourse with minor females. In view of the natural and societal allocation of the burdens of teenage pregnancy upon the female, the state

Legislature's decision to impose liability upon the male participant was justified. Due to the natural deterrent of pregnancy in the young female, it is not appropriate to assume in this context that "the woman has been the aggressor as often as the man." (*Caban v. Mohammed* (1979) 441 U.S. 380, 404 fn.8), 60 L.Ed.2d 297, 99 S.Ct. 1760 (Stevens, J., dissenting).)

Given the severe consequences of teenage pregnancy to the young female, none of which are shared to any significant degree by the male sexual partner regardless of his age, the classification contained in California Penal Code section 261.5 is substantially related to the deterrence of tennage pregnancy by punishing the party who participates in conception but bears none of its burdens.

D. The Statutory Classification Is Not Invalid on the Basis That It Is "Overinclusive".

Petitioner argues that if the prevention of teenage pregnancy is the purpose of the statute, the classification scheme is not substantially related to the achievement of that purpose for three reasons. First, petitioner argues that the statute is over-inclusive in that it does not exempt those who use birth control devices or "those who are otherwise incapable of procreation." (Brief of Petnr., pp. 18-19.) Second, because 37 states have enacted gender-neutral statutory rape laws, "California's gender-based statute is not necessary to further the interests of that state." (Brief of Petnr., pp. 19-21.) Third, petitioner argues that the statute is rarely invoked compared to the number of violations of the statute. (Brief of Petnr., pp. 22-24.)

Petitioner's contention that the statute is "overinclusive" because it applies in situations where pregnancy cannot result is insufficient to invalidate the statute. The frequency of incidence of teenage pregnancy is sufficient enough to

justify the conclusion that a statute intended to prohibit the risk of such pregnancies is within the state's police power. The state may act to prohibit the harm before it occurs.[3] The state Legislature should not require to draft statutes with the precision suggested by petitioner.

Moreover, petitioner has not alleged or asserted that he used a contraceptive device, is infertile or otherwise unable to father a child. Petitioner is therefore urging the Court to strike down the statute on the basis of its application to a hypothetical situation. As a general rule, "[a] party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights," but not as "applied to third parties in hypothetical situations." (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 154-155, 60 L.Ed.2d 777, 99 S.Ct. 2213.) The limited exception to the standing rule in situations where broad restrictions prohibit protected speech under the First Amendment has no application in the instant case. (*Ulster County Court v. Allen, supra*, 442 U.S. at p. 155.) Indeed, the prohibition against sexual intercourse with a minor involves no recognized constitutional right, and any suggestion that minors have an unfettered constitutional right to engage in sexual intercourse has been labeled as "frivolous." (*Carey v. Population Services International* (1977) 431 U.S. 679, 702

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[3]The reasoning of the Court in *Ohralik v. Ohio State Bar Assn.* (1978) U.S. 447, 56 L.Ed.2d 444, 98 S.Ct. 1912, while in a context different from that in the instant case, supports this position. In *Ohralik*, an attorney, suspended for solicitation of a client, argued that this conduct was protected under the First and Fourteenth Amendments unless the state could show *actual harm* from the solicitation. In rejecting the contention, the Court observed that regulations "prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs." (*Id.*, at p. 464.) Similarly, the California Legislature was not required to draft Penal Code section 261.5 in such a fashion that it would be violated only by acts which actually result in pregnancy. The risk of pregnancy to the unwed teenager justifies the prohibition of the act itself.

(White, J., conc.), 713 (Stevens, J., conc.).) Because the allegedly overinclusive application of California Penal Code section 261.5 has not been alleged or shown to apply to petitioner, he lacks standing to challenge the statute on that ground.

Petitioner's contention that the classification in the California Statute is "not necessary" to further the interests of the state because 37 states have enacted gender-neutral statutory rape provisions is a misapplication of the intermediate level of equal protection analysis and ignores the repeated rulings of state and federal courts upholding statutes protecting only minor females.[4] Under the intermediate level of equal protection analysis, the state is not required to show that its gender-based classification is necessary, as appellant argues. The appropriate test requires a showing that the classification is "substantially related" to the achievement of the governmental objective. (*Orr v. Orr, supra*, 440 U.S. at p. 279, 59 L.Ed.2d 306, 99 S.Ct. 1102; *Craig v. Boren, supra*, 429 U.S. at p. 197.) The requirement

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[4]In addition to the California Supreme Court below, the following authorities have rejected arguments that statutory rape laws are unconstitutional: (*Rundlett v. Oliver* (1st Cir. 1979) 607 F.2d 495, 497-503; *State v. Gray* (Ariz. 1979) 122 Ariz. 445, 595 P.2d 990, 992; *Barnes v. State* (Ga. 1979) 244 Ga. 302, 303-305, 260 S.E.2d 40, 41-42; *Olson v. State* (Nev. 1979) 95 Nev. Adv. 1, 588 P.2d 1018, 1019; *State v. Wilson* (N.C. 1979) 296 N.C. 298 311-313; 250 S.E.2d 621, 629-630; *State v. Brothers* (Del. 1978) 384 A.2d 402, 405-406; *State v. Rundlett, supra*, 391 A.2d at pp. 817-822; *State v. Housekeeper* (Utah 1978) 588 P.2d 139, 141; *People v. MndangePfupfu* (N.Y. 1978) 97 Misc.2d 496, 411 N.Y.S.2d 1000, 1002-1006; *Ex Parte Groves* (Tex. 1978) 571 S.W.2d 888, 890-892; *State v. Thompson* (N.J. Super. 1978) 162 N.J. Super. 302, 304-306, 392 A.2d 678, 680-681; *Hall v. McKenzie* (4th Cir. 1976) 537 F.2d 1232, 1234-1235; *People v. Salinas* (Colo. 1976) 191 Colo. 171, 174, 551 P.2d 703, 705-706; *State v. Meloon* (N.H. 1976) 116 N.H. 669, 670-671, 366 A.2d 1176, 177; *People v. Mackey* (Cal. 1975) 46 Cal.App.3d 755, 760, 120 Cal.Rptr. 157, cert. den. 423 U.S. 951; *State v. Drake* (Iowa 1974) 219 N.W.2d 492, 495-496; and *In re Interest of J.D.G.* (Mo. 1973) 498 S.W.2d 786, 792-793.)

of necessity urged by petitioner is accordingly not applicable, nor is every state constitutionally compelled to enact a gender-neutral statute.

Indeed, there are substantial drawbacks to a gender-neutral statute. In situations involving two minors, neither minor would be likely to make a complaint since to do so would be self-incriminating. Thus a gender-neutral statute would probably result in fewer prosecutions. If immunity were granted to one of the participants, most cases would be likely to require lengthy hearings in already burdened trial courts to determine whether there was a discriminatory prosecution. A gender-neutral statute does not offer the promise of legislative perfection assumed by petitioner.

Appellant's further argument that the classification does not serve any important governmental interest because it is frequently violated[5] but results in few prosecutions is a non-sequitur. The importance of a statute is its deterrent effect, which may be difficult or impossible to prove through empirical data. Certainly one would not argue that forcible rape statutes do not serve an important governmental objective because the incidence of the offense is increasing, it is not frequently reported to authorities and prosecutions are dif-

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[5]Petitioner has extrapolated that some 36,000,000 violations of California Penal Code section 261.5 occurred in 1975 based upon statistics drawn from a study of adolescent sexuality. (See Sorensen, *Adolescent Sexuality in Contemporary America* (World Publishing 1973) pp. 122-124.) While that study did indicate that 45% of all adolescent females had engaged in sexual intercourse, the term "adolescent" included females as old as 19 years of age. (*Id.*, at p. 27.) Due to the inclusion of 18 and 19-years olds in the study, it is not statistically relevant to the instant case because the statute in question applies only to those 17 years of age and younger. It is fair to assume that the females in the study over the age of 17, and outside the scope of the statute, make up a disproportionately high percentage of the 45% of adolescent non-virgin females, as opposed to the group of females between the ages of 13 and 17 years. The asserted 36,000,000 violations of the statute in 1975 is doubtful.

ficult. The more apt inquiry is whether a statute is reasonably intended to deter conduct which may be proscribed under the state's police power. The various statutory rape laws in the United States have repeatedly been upheld as such valid legislative judgments. (See fn. 4, *supra*.)

Finally, the statute is invoked more frequently than suggested by petitioner. It is true that California has not published juvenile arrests for unlawful sexual intercourse in its yearly Criminal Justice Profile. However, the statistics are maintained and indicate as follows:

Year	Total Adult Arrests	Adult Male	Adult Female	Juvenile Arrests	Juvenile Male	Juvenile Female
1975[6/]	475	381	6	87	69	18
1976	336	306	0	72	62	10
1977	324	316	0	59	56	3
1978	274	273	1	66	58	8
1979	298	296	2	52	49	3

These statistics indicate that the statute is enforced on a regular basis in California. The statistics also reflect that females are arrested for unlawful sexual intercourse, presumably on the theory they aided or abetted in the commission of the offense and therefore are culpable as principals under California Penal Code section 31. A female may be convicted of unlawful sexual intercourse in California as an aider and abettor. (*Cf. People v. Hernandez,*

[6/]The figures for the 1975-1977 adult arrests by sex are somewhat understated, as indicated by the fact that the sum of the adult male and adult female arrests for those years is less than the number of total adult arrests. Complete reporting of all arrests by sex is indicated in the 1978-1979 statistics. The above data is maintained by the California Department of Justice Bureau of Criminal Statistics pursuant to California Penal Code section 13020.

18 Cal.App.3d 651, 657, 96 Cal.Rptr. 71, holding a female guilty of rape on an aiding and abetting theory.) The statute is therefore neutral as the possible perpetrators, although the participation of a male would be necessary in any case.

The contention of Amicus Curiae Women's Legal Defense Fund (at p. 5), that the California unlawful sexual intercourse provision is not directed toward the prevention of pregnancy because "only penetration and not emission" is necessary to complete the offense" is without merit.[7] Pregnancy can result from intercourse which does not culminate in male ejaculation. (T. Tucker, *Birth Control* (Tobey Publ. Co. 1975) p. 130; L. L. Langley, *Contraception* (Dawden, Hutchison & Ross, Inc. 1973) pp. 13-14.) In addressing this point, it has been observed that the contention is contrary to sound policy for the following reasons:

> ". . . . An occasional suggestion may be found to the effect that emission must be established. If the theory back of this idea was pressed far enough it might reach the point of recognizing the effective use of a contraceptive as a complete defense to a prosecution for either rape or carnal knowledge of a child. It is safe to assume that no court would go this far. In fact, the premise itself is false. The sound rule which prevails very generally, if not uniformly today, is that emission is neither necessary nor sufficient to establish guilt in these cases. The essential element in this regard is

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[7]Similar fallacious reasoning was employed by the First Circuit in striking down New Hampshire's former statutory rape provision in *Meloon v. Helgemoe* (1st Cir. 1977) 564 F.2d 602, 607 fn.6, cert. den. 436 U.S. 950 (1978). Two years after deciding *Meloon*, the First Circuit upheld a virtually identical provision of Maine's law in *Rundlett v. Oliver* (1st Cir. 1979) 607 F.2d 495, raising a doubt as to the viability of the holding in *Meloon*. Although certiorari was denied in *Meloon*, 436 U.S. 950, it was noted that "THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN would grant . . . and reverse summarily, notwithstanding the new statute."

sexual penetration . . . .'' (Footnotes omitted; Perkins, *Criminal Law* (2d Ed. 1969) p. 155.

Based upon the foregoing, respondent submits that the classification scheme is clearly and substantially related to the prevention of teenage pregnancy.

II.

THE UNIQUE POTENTIAL FOR PHYSICAL INJURY TO THE IMMATURE FEMALE FROM SEXUAL INTERCOURSE JUSTIFIES THE STATUTORY CLASSIFICATION.

Petitioner argues that because some members of the class of protected victims are too young to conceive, California Penal Code section 261.5 cannot be sustained only on the theory it is intended to prevent teenage pregnancy.[8] (Brief of Petnr., p. 18.) However, as to the pre-pubescent girls physically incapable of conception, the classification in the statute is justified based upon the fact that the young female

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[8]Petitioner mentions at several points in his brief that the prevention of pregnancy is the only asserted purpose for the statute. (Brief of Petnr., pp. 13, 17.) To the extent petitioner is referring to the opinion of the Supreme Court of California, his position is accurate. The state court found the prevention of teenage pregnancy to be a ''compelling state interest,'' and its analysis went no further than to recognize that justification for the statutory classification. (*Michael M. v. Superior Court* (Cal. 1979) 25 Cal.3d 608, 612, 601 P.2d 572.)

The position taken by respondent below was not similarly limited. Respondent below also urged the constitutionality of California Penal Code section 261.5 on the following grounds: (1) as applied to the forcible conduct fairly reflected in the preliminary hearing transcript (App. 21-22, 32-33), the statute promoted the state's interest in prohibiting forcible intercourse (Return to Alternative Writ of Prohibition and Memorandum of Points and Authorities, pp. 6-8); (2) the sexes are not similarly situated for purposes of California Penal Code section 261.5, therefore identical treatment is not required (*id.*, at pp. 8-11); and (3) the ''prevention of physical harm from the sex act itself'' is a compelling state interest which justifies the statutory classification (*id.*, at p. 29). Although the Supreme Court of California did not proceed in its analysis beyond the recognition of pregnancy prevention as a compelling state interest, respondent does not abandon these additional grounds in support of affirmance.

is uniquely and exclusively susceptible to physical damage resulting from sexual intercourse. (*State v. Rundlett, supra*, 391 A.2d at p. 822; *Rundlett v. Oliver, supra*, 607 F.2d at p. 502; *People v. Dozier, supra*, 424 N.Y.S.2d 1010, 1014.)[9]

Moreover, the incidence of sexual abuse of younger females appears to be far greater than that of young males. In one reported study 86 of 100 children examined in a hospital emergency room over a three-year period were girls. (Orr and Prietto, *Emergency Management of Sexually Abused Children*, 133 Amer. J. Dis. Child, pp. 628-629 (June 1979).) A group of five studies all found approximately 88% of minor sexually abused victims to females. (Jaffe, Dynneson & Ten Bensel, *Sexual Abuse of Children*, 129 Amer. J. Dis. Child, p. 690 (1975).) Thus the assumption that young females are more likely to be the victims of sexual abuse is not merely an unsupported supposition but instead is a demonstrable fact which justifies the special protection afforded physically immature females. The gender based classification in California Penal Code section 261.5 "is a 'proxy' sufficiently accurate for restricting potentially physically injurious sexual intercourse via its criminal sanction," and the state is justified in sub-

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[9]In *State v. Rundlett, supra*, 391 A.2d at p. 819 fn.13, the court quoted from a study of rape victims indicating that while older females rarely suffered injury to the genitals, such injuries are quite common in young adolescent females and include abrasions, hymenal transections, first degree vaginal tears and perianal tears. Thus even if the "doubtful assumption" of similarity of occurrence of molestation for young males and females is accepted, the significant greater risk of physical injury to the young female constitutes an important governmental interest which supports the statutory classification. (*Id.*, at pp. 819-820 fn.16.)

jecting only male offenders to its criminal liability. (*Rundlett v. Oliver, supra,* 607 F.2d at p. 503.)

* * * * *

III.

THE STATUTE DOES NOT VIOLATE EQUAL PROTECTION AS APPLIED TO PETITIONER.

Petitioner questions the constitutionality of California's unlawful sexual intercourse provision on the ground that it "arbitrarily holds the male criminally culpable even though the female may be older, more mature or herself the sexual aggressor." (Brief of Petnr., p. 12; see also Brief of Amicus Curiae Amer. Civ. Lib. Un. pp. 28-37.) Since the statute is being employed in the instant case in the context of forcible conduct, which the state can clearly regulate under its police power, and not in the unusual circumstances posited by petitioner, the statute is constitutional as applied.

California Penal Code section 261.5 applies on its face to forcible and consensual conduct, in that it prohibits "an act of sexual intercourse" with a female under the age of 18.[10] In the instant case, the only evidence presented indicates that the victim, Sharon, age 16, submitted to an act of sexual intercourse with petitioner, age 17, after being struck in the face two or three times. (App. 21-22.) Certainly the State of California has an important governmental interest in protecting young females from forcible intercourse and risk of pregnancy, regardless of the age of the male.

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[10]As applied to forcible conduct, the same act of intercourse could therefore constitute forcible rape (Cal. Pen. Code §261), unlawful sexual intercourse (Cal. Pen. Code §261.5), and if the victim was under the age of 14 years, lewd and lascivious acts upon the body of a child under the age of 14 (Cal. Pen. Code §288(a)).

California Penal Code section 261.5, as applied in the instant case is clearly constitutional.[11]

In view of the factual setting of the instant case, petitioner lacks standing to challenge the statute as applied to a situation in which the minor female is older than the male participant in the act of intercourse and is herself the aggressor. That hypothetical scenario is not before the Court and the statute's application to those facts need not be considered. (*Ulster County Court v. Allen, supra*, 442 U.S. at pp. 155-156.) If and when a prosecutor in California commences a prosecution upon the improbable factual pattern suggested by petitioner, the constitutionality of the statute as so applied can then be considered.

Indeed, California's unlawful sexual intercourse provision is applied in a variety of contexts, in addition to where force is used, in which the state's interest is manifest. For example, the statute has recently been applied to an acts of intercourse by a pimp with 15-year old prostitutes. (*People v. Dunn* (1980) 107 Cal.App.3d 138, 142, 165 Cal.Rptr. 574.) The statute has also been utilized in a case in which a youth facility supervisor engaged in intercourse with a minor trustee. (*People v. Rocca* (1980) 106 Cal.App.3d 685, 688, 165 Cal.Rptr. 226.) Another application of the statute has involved an act of intercourse during the filming of a pornographic movie. (*People v. Lewis* (1952) 113 Cal.App.2d 468, 469, 248 P.2d 461; *People v. Zeihm* (1974) 40 Cal.App.3d 1085, 1088, 115 Cal.Rptr. 528.) Finally,

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[11]Indeed, forcible conduct has been present in several cases upholding statutory rape provisions. (See, e.g., *In re Interest of J.D.G., supra*, 498 S.W.2d at pp. 793; *State v. Drake, supra*, 219 N.W.2d at p. 494; *People v. Salinas, supra*, 551 P.2d at pp. 704-705; *State v. Brothers, supra*, 384 A.2d at p. 403.) Even the aberrant holding in *Meloon v. Helgemoe* (1st Cir. 1977) 564 F.2d 602, recognized that its "analysis is predicated on the consensual nature of the crime committed by appellee." (*Id.*, at p. 605 fn.4.)

application of the statute to situations in which a male exercises dominance over the minor female due to some relationship, such as teacher-student or stepfather-daughter, (*People v. Alva* (1979) 90 Cal.App.3d 418, 421, 153 Cal.Rptr. 644; *People v. Fritts* (1977) 72 Cal.App.3d 319, 323, 140 Cal.Rptr. 94), clearly promotes important, if not compelling governmental interests. Respondent urges the Court to uphold the validity of California Penal Code section 261.5 as constitutionally applied to forcible conduct in the instant case, and to reject analysis of the statute as applied in hypothetical situations.

CONCLUSION.

For all the foregoing reasons, respondent respectfully urges the Court to uphold the constitutionality of California Penal Code section 261.5.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-1344

IN THE

Supreme Court of the United States

1980 TERM

MICHAEL M.,

Petitioner,

—v.—

SUPERIOR COURT OF SONOMA COUNTY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, IN SUPPORT OF PETITIONER, *AMICI CURIAE*

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Interest of Amici Curiae

The American Civil Liberties Union is a nationwide, nonprofit organization of over 200,000 persons, dedicated to defending and protecting the rights enumerated in the

Constitution. Together with its affiliates, including amicus American Civil Liberties Union of Northern California, the ACLU has had a special interest in challenging gender-based discriminations as violative of the constitutional equal protection guarantee. ACLU attorneys have appeared in this Court, either directly or for amici, in most of this Court's gender discrimination cases.

The decision below rests on an archaic, overbroad generalization under which California penalizes sexual intercourse with minor women, but not with minor men, and prosecutes only males for such intercourse even where both parties are minors. We believe the ACLU's experience in gender-discrimination cases can be of substantial assistance to the

Court as it decides whether the conviction of Michael M. under these circumstances would deny him the equal protection of the laws guaranteed by the Constitution.

SUMMARY OF ARGUMENT

Michael M.'s conviction under §261.5 of the California Penal Code is invalid under the equal protection clause for two independent reasons.

First, §261.5 is itself facially violative of the equal protection guarantee. Because it discriminates on the basis of gender, authorizing punishment of men who have sexual intercourse with women under 18 years of age, but not punishment of women who have intercourse with men under 18, §261.5 must satisfy at least

the test articulated in Craig v. Boren, 429 U.S. 190 (1976). Point 1A. Section 261.5 fails to meet that test. The purpose asserted, prevention of pregnancy, is only a hindsight rationalization. The statute's actual purpose, the protection of female virtue, is constitutionally impermissible. Point 1B. Even if pregnancy prevention were its real purpose, Section 261.5 would be invalid because premised on archaic and overbroad stereotypes. Point 1C.

In any event, even were the Court to uphold §261.5 against a facial attack, the equal protection guarantee forbids its application here. Not only the so-called "victim" here, but also petitioner, was under the California age of consent. California has advanced no reason justify-

ing holding only under-age males, and not under-age females, culpable for consensual sexual intercourse with an under-age partner. It is irrational to hold only the minor male criminally responsible for such joint conduct, where he is roughly the same age as his female sexual partner. Point II.

ARGUMENT

I. CALIFORNIA PENAL CODE SECTION 261.5 CREATES A GENDER-BASED CLASSIFICATION VIOLATIVE OF THE EQUAL PROTECTION CLAUSE.

A. Section 261.5 Discriminates On The Basis Of Sex And Must Therefore Be Subject To Heightened Scrutiny Under The Equal Protection Clause.

As the majority below expressly conceded, Michael M. v. Superior Court, 25 Cal. 3d 608, 611 (1979), Section 261.5 discriminates on the basis of gender. It punishes males who engage in consensual sexual intercourse with females under eighteen but not females who engage in the same conduct with males under eighteen. It is well settled that statutory gender classifications are subject to heightened scrutiny under the equal protection clause. Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Craig

v. Boren, 429 U.S. 190 (1976). The fact that a classification arguably discriminates against men rather than women does not shield it from such scrutiny. Orr v. Orr, 440 U.S. 268, 278 (1979).

The standard of review for gender classifications is at least the so-called "intermediate" or "middle tier" standard first articulated in Craig v. Boren, 429 U.S. at 197: "To withstand constitutional challenge...classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Wengler v. Druggists Mutual Insurance, 48 U.S.L.W. 4459, 4461 (1980); Orr v. Orr, supra; Califano v. Webster, 430 U.S. 313 (1977). Since Section 261.5 is a criminal statute, the Craig standard must be applied with added bite and "special sensitivity".

Meloon v. Helgemoe, 564 F.2d, 602, 604 (1st Cir. 1977), cert. den. 436 U.S. 950 (1978). In the criminal justice context, where the coercive power of the state "weighs most heavily upon the individual or the group" and where deprivation of basic liberty is at stake, the normative demands of the equal protection clause must be rigorously and scrupulously enforced. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

As applied by this Court in recent cases, the Craig test is tripartite. First, it demands that the asserted governmental objectives be "important". The promotion of traffic safety, Craig v. Boren, 429 U.S. at 199, the provision of assistance to needy spouses, Orr v. Orr, 440 U.S. at 280, and the reduction of economic disparity between men and women, Califano v. Webster,

430 U.S. at 317, have all been adjudged sufficiently "important" governmental objectives.

Second, the Craig standard requires that the objective of the challenged statute be substantially furthered, both in reason and in fact, by the differential gender treatment. A challenged gender classification may not be premised on traditional but unsubstantiated assumptions or manifestly overbroad generalizations about the "proper" roles or "usual" characteristics of the two sexes. Under the Craig standard, differential gender treatment may not be premised on such "archaic and overbroad generalizations", Schlesinger v. Ballard, 419 U.S. 498, 508, (1975), as the following: that men make better estate administrators then women, Reed v. Reed, 404 U.S. 71 (1971); that

women are dependent on their husbands for financial support while men are not dependent on their wives, Califano v. Goldfarb, 430 U.S. 199 (1977); that women are destined for home-making rather than for the marketplace or world of ideas, Stanton v. Stanton, 421 U.S. 7 (1975).

Third, the purpose asserted in defense of the challenged gender classification must have been among the actual purposes of the enacting legislature. Where a gender classification is at issue the mere incantation of an important governmental purpose is "not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme". Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975). Rather, the Craig standard requires an independent examination of the language, structure, and history

of the challenged statute in order to determine whether the asserted purpose is simply "a convenient, but false, post hoc rationalization", Craig v. Boren, 429 U.S. at 199 n.7, for a statute promulgated with other purposes in mind. Califano v. Webster, 430 U.S. at 317; Weinberger v. Wiesenfeld, 420 U.S. at 648; Meloon v. Helgemoe, 564 F.2d at 607. Under "intermediate" level scrutiny, post hoc rationalization - justification by reference to objectives other than those which the enacting legislature in fact had in mind - is impermissible. See L. Tribe, American Constitutional Law 1085 (1979).

B. The Language, Structure, And History Of Section 261.5 Show That The Prevention Of Teen-Age Pregnancies Is A Convenient Hindsight Rationalization For A Statute Enacted With Different Purposes In Mind.

Respondent below makes an impressive showing that illegitimate teenage pregnancy is a major medical and social problem in California. Amici do not dispute the reality or the gravity of that problem, or deny that reducing the incidence of such pregnancies is an "important" governmental objective. What amici do dispute is respondents' assertion, embraced by the majority below without due skepticism, that section 261.5 was actually enacted for that purpose.[1/] Respondent has not

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1/A state's highest court is the ultimate expositor of the meaning of its state's laws. Brown v. Ohio, 432 U.S. 161, 167 (footnote continued on next page)

(footnote continued from previous page)

(1977); Gurley v. Rhoden, 421 U.S. 200, 208 (1975); Mullaney v. Wilbur, 421 U.S. 684, 691 (1975). But this Court is not similarly bound by state court pronouncements on the purposes of state laws. It "need not in equal protection cases accept at face value assertions of legislative purposes", Weinberger, 420 U.S. at 648 n.16, even by a state's highest court, but may instead undertake an independent examination of the legislative scheme and history. See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972) (statement by Massachusetts Supreme Judicial Court as to challenged statute's purpose examined and rejected).

As a general matter this Court must remain the final arbiter of a state law's purposes whenever the applicable constitutional test turns on a determination of "true" or "actual" purpose. Otherwise, state courts, by "finding" valid purposes, could effectively shield discriminatory laws from the scrutiny of this Court. The need for this Court to undertake an independent examination is especially urgent in the present case where the state court majority below simply disregarded its own long-standing construction of statutory purpose. When this Court undertakes its own independent inquiry into a challenged statute's actual purposes, the views of the state court below deserve careful consideration. But these views cannot be controlling. See, e.g., Rundlett v. Oliver, 607 F.2d 495, 500-1 (1st Cir. 1979).

offered an iota of evidence, intrinsic or extrinsic, that the prevention of such pregnancies was among the purposes for which the California statutory rape law was originally enacted or later re-enacted. To the contrary, all the inferences that may be drawn from the statute's history, language, and structure indicate that its purpose was the protection of young female virtue. Under the "actual purposes" rule of Weinberger, pregnancy prevention may not be invoked to save §261.5.

Section 261.5 proscribes the conduct previously denominated "statutory rape". When first enacted in 1850 (Stats. 1850, Ch.99, 847, §234) the statute followed the English statute of 1576 (18 Eliz.I, Ch.7, §4), proscribing sexual intercourse with females under the age of ten. Inasmuch as females did not reach puberty until well after that age, California's

original statutory rape law obviously could not have been enacted for the purpose of preventing pregnancies.

Between 1889 and 1913 the age of consent was raised incrementally from ten to eighteen. The age of eighteen was retained when the statute was recodified and the offense re-named in 1970. See Note on Legislative History following California Penal Code Sections 261 (West 1970) and 261.5 (West Supp. 1977). But there is no reason to believe that the legislature raised the age of consent in order to prevent teenage pregnancies. The age of consent was raised to eighteen in 1913, before the radical change in teenage sexual mores which has created the present teenage pregnancy problem. Moreover, as the dissent persuasively argued, "a far more

plausible explanation" for the gradual increase in age of consent is the parallel change in popular views "both with regard to the suitable age of women for marriage and the age until which they were deemed appropriately subject to protective legislation." Michael M. v. Superior Court, 25 Cal. 3d 608, 619 (Mosk, J., dissenting). Thus whereas the 1872 California Civil Code fixed 15 as the age at which a female could marry without parental consent, the 1921 Civil Code raised that age requirement to 18. Id. Furthermore, even after the legislature had raised the age of consent to a point at which conception was biologically possible, the courts of California uniformly identified the statute's purpose as the protection of the virtue of California's girlhood. See, e.g., People v. Verdegreen, 106 Cal. 211, 214, 39 P.607 (1895)("The

obvious purpose of [the statute] is the protection of society by protecting from violation the virtue of young and unsophisticated girls"); People v. Edwards, 163 Cal. 752, 757, 127 P.58 (1912). Indeed, the Verdegreen court went so far as to hold that mere "advances" made with an intent to commit statutory rape could constitute an assault to commit that offense, reasoning as follows: "It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it; and the prevention of this, as much as the principal act, must undoubtedly have been the intent of the legislature". 106 Cal. at 215.

In more recent decisions, prior to Michael M., the California Supreme Court consistently identified the protection of

female virtue as the statute's purpose. Thus, in People v. Hernandez, 61 Cal. 2d 529, 531, 393 P.2d 673 (1964), a carefully considered leading opinion on the mistake of age defense in the statutory rape context, the California Supreme Court stated that its statutory rape law was designed to prevent a young female, "presumed too innocent and naive to understand the implications and nature" of the sexual act, from making "an unwise disposition of her sexual favor". Such a disposition is deemed, the court explained, to do "harm both to herself and the sexual mores by which the community's conduct patterns are established". The prevention of pregnancy is nowhere mentioned by the Hernandez Court. Rather, it is "abstinence from sexual indulgence" on the part of young women that the statute

is said to promote. Inasmuch as there is no evidence that the California legislature repudiated this reading of the statutory purpose when it re-enacted the provision in 1970, it may properly be deemed to have adopted it. See, e.g., Scripps Memorial Hospital v. California Employment Commission, 24 Cal. 2d 669, 151 P.2d. 109 (1944); South Dakota v. Brown, 20 Cal. 3rd 765, 772-73, 576 P.2d 473, 480-81 (1978); Belridge Farms v. Agricultural Labor Relations Board, 21 Cal. 3rd 551, 557, 580 P.2d 665, 681 (1978).

The language and structure of §261.5 likewise attest to a purpose other than the prevention of illegitimate teenage pregnancy. For the statute "makes no attempt to define culpability in terms of sexual intercourse that creates a risk of pregnancy", 25 Cal. 3d 608, 620 (Mosk, J., dissenting), but rather proscribes numerous classes of acts

which cannot result in pregnancy (or are very unlikely to do so). For example, §261.5 applies whether or not reliable contraceptives are used, whether or not the female is pubescent, whether or not one partner knows himself or herself to be sterile, and so forth. On its face the statute applies to a fourteen year old pre-pubescent male who has made the slight penetration necessary to commit the offense ("Any sexual penetration, however slight, is sufficient to complete the crime", Pen. Code, §263), as well as to an adult male who has had a vasectomy. With regard to pregnancy prevention, then, §261.5 is clearly over-inclusive. This strongly corroborates what the review of the statute's history disclosed - that its purpose is to prevent the act of sexual intercourse itself, not the pregnancy

which may result therefrom. Cf. Orr v. Orr, 440 U.S. at 280 n.10.

California may well have a legitimate interest in protecting and safeguarding the good morals of its youth. But recent decisions of this Court make clear that a state may not constitutionally undertake to promote different moral codes for its male and female youth or to reinforce a traditional and outworn division of socio-sexual roles. See, e.g., Stanton v. Stanton, 421 U.S. 7, 15 (1975) (Utah's differential age-of-majority statute may not be justified by the "old notion" that a woman is "destined solely for the home and the rearing of the family"); Orr v. Orr, 440 U.S. at 279, (Alabama may not constitutionally frame its alimony laws with the objective of reinforcing among its citizens a family model in which the

wife plays a dependent role).

California has undertaken to do in §261.5 precisely what Stanton and Orr forbid. In §261.5 California has unmistakably announced its belief that the virginity of teenage girls is more precious than that of teenage boys. It has "effectively announced", Orr, 440 U.S. at 279, its strong preference for sexual "abstinence", Hernandez, 61 Cal.2d at 531, by its female youth, and its relative indifference to sexual activity by its male youth. It has, in short, put the imprimatur of the state on the "double standard". Section 261.5 is thus an expression of the sort of "romantic paternalism" no longer tolerable under the equal protection clause.

C. The Exclusion Of Young Males From The Protection Afforded By Section 261.5 Impermissibly Reflects And Reinforces Sexual Stereotypes Unfavorable To Both Sexes.

Even assuming arguendo that its purpose is in fact the prevention of teenage pregnancy, §261.5 cannot survive scrutiny under the Craig standard because it is premised on "archaic and overbroad generalizations", Schlesinger v. Ballard, 419 U.S. 498, 508 (1975), about the two sexes. The exclusion of young males from the protection of Section 261.5 is the result not of a careful and considered analysis of their different needs but rather of an unthinking assumption that they cannot be as seriously harmed by sexual intercourse as can young females. This sort of unreflective "traditional way of thinking" about the sexes is constitutionally unacceptable. Califano v.

Goldfarb, 430 U.S. at 223 (1977)(Stevens, J., concurring).

The overall effect of California's statutory scheme can be simply stated. An adult female who engages in sexual intercourse with a minor male might possibly be subject to prosecution for a misdemeanor under Section 272 ("contributing to the delinquency of a minor"). An adult male who engages in the very same conduct with a minor female is subject to prosecution not only for a misdemeanor under Section 272 but also for a felony under Section 261.5 ("unlawful sexual intercourse"). The result, quite clearly, is that minor males are not afforded the same protection from sexually predatory adults as are minor females.

The majority below reasoned that minor

females are afforded more protection simply because they need more. After all, the majority observed, minor females are susceptible to the "demonstrably greater" harm associated with unwanted pregnancy. Michael M. v. Superior Court 25 Cal.3d 608, 613 (1979). The trouble with the majority's justification of the disparate treatment is that it disregards the fact that minor males can and do suffer from sexual intercourse harm as grave as, albeit different from, that suffered by minor females. See, e.g., D. Finkelhor, Sexually Victimized Children (1979). California's decision to give only minor females the additional protection of §261.5 was based, amici submit, not on a careful comparative analysis of the needs of the two classes of minors, but rather on unreflective stereotyped assumptions about the four classes of persons involved.

These underlying stereotypes are not difficult to divine. Adult males are assumed to be aggressive predators whose passions will lead them to exploit young females unless deterred by the threat of heavy criminal penalties. Minor males are assumed to be able to "take care of themselves". For them, early sexual experience is supposed to be a welcome and pleasant initiation creating no appreciable risk of psychological harm. Minor females, in contrast, are assumed to be passive, weak-willed, vulnerable to trickery and intimidation: for them early sexual experience is supposed to be traumatic, painful, and degrading, creating a serious risk of permanent psycho-sexual harm. Finally, adult females are assumed to be uninterested in minor males as sexual partners and unable to trick or pressure them into sexual activity which they do not

really desire or for which they are psychologically unprepared.

Section 261.5, then, is premised on assumptions about the two sexes which are invidious, manifestly overbroad, and demonstrably at odds with recent empirical research. See, e.g., D. Finkelhor, Sexually Victimized Children at 80 (reporting that young males often perceive early sexual experience with adult females "negatively"); Report of the Royal Commission on the Status of Women in Canada Ch.9, par. 42, at 374 (1970)(recommending that the Criminal Code be amended to extend protection from sexual abuse to male juveniles); R. Geiser, Hidden Victims: The Sexual Abuse of Children at 23 (1979) (reporting that sexual assaults on children by women are increasing). A statute so premised cannot withstand constitutional scrutiny under the Craig standard.

II. SECTION 261.5 CANNOT CONSTITUTIONALLY BE APPLIED WHERE THE OFFENDER IS A MINOR, ONLY ONE YEAR OLDER THAN HIS ALLEGED "VICTIM".

Petitioner stands charged by information with a felony violation of §261.5 (unlawful sexual intercourse). At the time of the alleged violation petitioner was 17 years old and his alleged "victim" was scarcely a year younger than himself. Even if §261.5 could be applied constitutionally to protect minor females from older, more sophisticated males, its application here nevertheless clearly violates the equal protection guarantee. Where the male is himself a minor legally presumed to possess less maturity and wisdom than adults, and moreover has not exploited a significant disparity in age to seduce, intimidate, or trick the female minor into sexual intercourse, it is wholly

arbitrary and irrational to single him out for criminal punishment.[2/] The fact that only the minor female is susceptible to pregnancy has no bearing at all on their relative culpability for a joint act of intercourse.

As the Brief for Petitioner amply demonstrates, §261.5 is a decidedly anomalous statute. Only in a mere handful of American jurisdictions would the facts alleged in the information against petitioner constitute a criminal offense. In

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2/The present case does not present, and this Court need not decide, the question whether §261.5 can constitutionally be applied where the male offender is an adult slightly older than his minor "victim" (e.g. 19-year-old male, 17-year-old female) or where the male, though a minor, is significantly older than his female "victim" (e.g. 17-year-old male, 11-year-old female).

fully three-fourths of the states the age of consent is 16 or below. Seven states demand that the offender be at least 18. Six others require that the offender be a specified number of years older (usually two or four) than his "victim". In several others a two or four year age differential aggravates the penalties. In the great majority of states, then, criminal liability is imposed on the male only where, by virtue of his greater age, he can fairly and reasonably be assumed to be primarily responsible for the proscribed sexual activity.[3/] California's

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3/Respondent contends that the "overwhelming weight of authority" supports the constitutional validity of statutory rape laws. Brief of Respondent in Opposition to Certiorari at p.3. But none of the cases cited by respondent addresses the precise issue presented here.

In some of the cited cases the challenged

(footnote continued on next page)

statute stands almost alone in taking no account whatever of the absolute age of the male offender (any male who has reached 14, the age of criminal responsibility, may be prosecuted under §261.5) or the relative ages of the participants. Thus in California a 14-year-old male can be prosecuted under §261.5 for sexual intercourse with a 17-year-old female, even where the female initiated the activity. The female, in these circumstances, cannot be prosecuted at all under §261.5. As applied to a minor male of roughly the same age as his "victim", the California statute's automatic assignment of exclusive culpability to the male is arbitrary and invidious. See e.g., Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972)(Oklahoma statute giving the benefit of juvenile court proceedings to females under 18 and

males under 16 violates the equal protection clause); Commonwealth v. McKenzie, 368 Mass. 613, 334 N.E.2d 613 (1975)(statute making it a misdemeanor for father but not mother to beget a child out of wedlock violates equal protection clause); Commonwealth v. Staub, 337 A.2d 258 (Pa. 1975)(larger fine for man than for woman convicted of fornication violates equal protection clause).

California's asserted interest in the prevention of teenage pregnancy cannot justify such disparate gender treatment, inasmuch as the act which creates the risk of pregnancy is one in which both minors participate and for which both must at least be presumed equally responsible.[4/]

4/This is not to say that each of the two minors must be punished with equal severity in every case. What the equal protection clause requires are determinations of culpability made on an individualized basis rather than on a wholesale gender basis.

To be sure, only the minor female can become pregnant. But this fact does not diminish, and is irrelevant to, her responsibility.[5/] For instance, a 16-year-old female who knowingly misleads her earnest and concerned 16-year-old partner about the risk of pregnancy (e.g., by assuring him that she takes birth control pills) is surely more culpable then he. Should a pregnancy result it is she, if anyone, who ought to be held legally answerable.

Nor can California defend its conclusive presumption of male culpability on the ground that with respect to sexual

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5/ The majority below seems to confuse the issue of responsibility with that of just punishment. A minor female who engages in consensual sexual intercourse with a minor male must be presumed equally responsible for the act which creates the risk of pregnancy. That she may suffer, or has already suffered, the unhappy consequences of an unwanted pregnancy may perhaps argue for leniency at the sentencing stage. But it is not morally exculpatory.

activity minor females are "in general" less knowledgeable and sophisticated, less capable of making informed and reasoned decisions, or less resistant to subtle psychological coercion and deception than are their minor male counterparts. Such a defense is constitutionally unacceptable in several respects. First, the notion that young males develop mental and emotional capacities at an earlier age than young females is nothing but an "old notion", Stanton v. Stanton, supra, wholly lacking in empirical support. In a society where female children were carefully sheltered from knowledge of "the facts of life" that notion might have had some basis. In contemporary California it clearly has none at all. Second, California law contemplates many situations in a young person's life, arguably of equal or greater importance than

the decision to engage in sexual intercourse, in which the two sexes are clearly presumed to possess equal capacity to make the necessary decisions and give prudent and informed consent. For example, all minors over age 14 are responsible for their criminal conduct (Penal Code Section 26); all minors over 14 may appoint guardians ad litem (Civil Code Section 373); all minors living apart from parents or guardians may consent to medical treatment (Civil Code Section 34.6). California does not (and doubtless cannot) convincingly explain why minors of both genders are presumed to be equally capable in such matters, while only female minors are presumed unable to appreciate the significance of sexual intercourse.

If California genuinely believes that a female under 18 cannot comprehend the

full significance of sexual intercourse and protects her from being held responsible for the consequences thereof, then it is irrational and inconsistent to hold males of the same or lesser age criminally responsible for the same conduct. See Rundlett v. Oliver, 607 F.2d 495, 502 n.15 (1st Cir. 1979)("...we note...that we remain in doubt as to the acceptability of justifying a gender based classification on the basis of a pregnancy prevention rationale...[w]e doubt that the Maine legislature, having adjudged that persons under a certain age are incapable of giving informed consent to the act of sexual intercourse, would choose to penalize only a male under-aged partner for taking the... risk of conceiving a child".) Application of Section 261.5 to petitioner, but not to his female "victim", constitutes a denial of equal protection.

CONCLUSION

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
SEP 9 1980
MICHAEL RODAK, JR., CLERK

No. 79-1344

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL M., PETITIONER

v.

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THE PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether California Penal Code § 261.5, which prohibits a male from having sexual intercourse with a female under age 18 who is not his wife, violates the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF THE UNITED STATES

This case raises the question whether carnal knowledge or statutory rape provisions that are not gender neutral unconstitutionally discriminate on the basis of sex. Like the California provision at issue here, the federal carnal knowledge statutes prohibit a male from having sexual intercourse with an underaged female not his wife; females are not prohibited from having sexual intercourse with an underaged male. See 18 U.S.C. 1153, 2032; D.C. Code § 22-2801 (Supp. I 1974). Thus, although the age limitation in the federal statutes is two years lower than the age limitation in the California statute (under 16 versus under 18), petitioner's contentions in this case may draw into question the constitutionality of the federal statutes, which have recently been declared facially unconstitutional by the Ninth Circuit. See *United States* v. *Hicks*, No. 78-2534 (Apr. 16, 1980).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall * * * deny to any person within its jurisdiction the equal protection of the laws.

Cal. Penal Code § 261.5 (West 1973) provides:

> Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.

Cal. Penal Code § 264 (West 1973) provides in pertinent part:

> Unlawful sexual intercourse, as defined in Section 261.5, is punishable either by imprisonment in the

> county jail for not more than one year or in the state prison * * *.

18 U.S.C. 1153 provides, in pertinent part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, * * * carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, * * * shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. 2032 provides:

> Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years.

STATEMENT

1. In July 1978, a complaint was filed in the Municipal Court of Sonoma County, California, alleging that petitioner, then a 17½-year-old male, had had unlawful sexual intercourse with a female under the age of 18, in violation of Cal. Penal Code § 261.5 (West 1973).[1] The evidence adduced at a preliminary hearing showed that at approximately midnight on June 3, 1978, petitioner and two friends approached Sharon, a 16½-year-old female, and her sister as they waited at a bus stop. Petitioner and his friends invited Sharon and her sister to drink some wine with them, and, after a short conversation, both Sharon and her sister agreed to accompany

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[1] Petitioner had initially been charged in the Supreme Court of Sonoma County as a juvenile, in violation of Cal. Welf. & Inst. Code § 602 (West Supp. 1980), but had been found unfit for treatment as a juvenile (J.A. 3). See Cal. Welf. & Inst. § 707(a) (West Supp. 1980). Subsequent references to Cal. Penal Code § 261.5 are to the current codification. (The amendment of that Section after the complaint was filed has no bearing on the issue in this case.)

the three males to a nearby railroad track. Thereafter, petitioner and Sharon, who had already been drinking, moved away from the others to some nearby bushes where they began to kiss. Subsequently, after Sharon's sister and petitioner's friends had left, petitioner and Sharon began kissing on a park bench. Petitioner then told Sharon to take off her pants. When Sharon refused and tried to get up, petitioner struck her in the face several times. At that point, Sharon submitted to having sexual intercourse with petitioner (J.A. 3-4, 7-8, 19-23, 26, 32-33).[2]

On July 27, 1978, respondent State of California formally charged petitioner with violating Section 261.5 in a one-count information filed in the Superior Court of Sonoma County (J.A. 7-8). At his arraignment that same day, petitioner moved to set aside the information on both state and federal constitutional grounds, asserting that Section 261.5 unlawfully discriminated on the basis of gender. The trial court denied this motion, but prior to trial petitioner sought a writ of prohibition from the California Court of Appeals (J.A. 2-5). On September 14, 1978, the Court of Appeals summarily denied petitioner's request for relief (*id.* at 9).

2. Petitioner then sought review in the Supreme Court of California. A divided Supreme Court rejected petitioner's claim that the California unlawful sexual intercourse statute violated state and federal equal protection principles (Pet. App. A-1 to A-24). The court first stated that "section 261.5 discriminates on the basis of sex because only females may be victims, and only males may violate the section" and that therefor the State must demonstrate that the statute's classification furthers a *compelling* governmental interest (Pet. App. A-2 (emphasis supplied)). The court found that the gender classification at issue here "is supported not by

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[2] Petitioner did not present any evidence at this preliminary hearing, although his counsel did extensively cross-examine Sharon.

mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant" (Pet. App. A-3). Canvassing "the tragic human costs of illegitimate teenage pregnancies"—including the large number of illegitimate births and teenage abortions, the increased medical risks associated with teenage pregnancies, and the social consequences of teenage childbearing—the court concluded that the State has a compelling interest in preventing such pregnancies (*id.* at A-3 to A-5). Because males alone can "physiologically cause the result which the law properly seeks to avoid," the court further held that the gender classification was readily justified as a means of identifying offender and victim (*ibid.*).

The court also rejected petitioner's contentions that the statute is both overbroad and underinclusive. With regard to petitioner's claim that the statute is overinclusive because it applies to sexual intercourse involving birth control devices or persons otherwise incapable of procreation, the court observed that such defenses would entail difficult, if not insurmountable problems of proof, particularly in the case of a young prosecutrix (Pet. App. A-5 to A-6). The court also pointed out that contraceptives are not fail-safe (*id.* at A-6).

Likewise, the court concluded that the statute is not impermissibly underinclusive. Noting that minor females are by definition subject to risks and adverse consequences not faced by males, the court held that the legislature is not constitutionally compelled to hold the female victims equally culpable with the male perpetrators (Pet. App. A-6). The court further explained that "the Legislature may well have believed that the criminal prosecution of a minor female equally with a male would, as a practical matter, effectively eliminate any possibility whatever of prosecution under the statute" and that "[b]ecause the Legislature has enacted this legislation with the principal objective of protecting minor females as a class it is not surprising that it simultaneously elected to exclude the victim herself from the statutory

proscription" (Pet. App. A-7). In addition, the court pointed out that California law as a whole adequately protects all minors from sexual abuse (citing Cal. Penal Code §§ 272, 288 (West 1973)), and that "[w]omen may be prosecuted under these statutes if they engage in sexual relations with underage males" (*id.* at A-6). Thus, "Section 261.5 merely provides additional protection for minor females in recognition of the demonstrably greater injury, physical and emotional, which they may suffer" (*id.* at A-7).[3]

Three judges dissented, concluding that Section 261.5 was designed to protect women's virtue, not to avoid teenage pregnancies (Pet. App. A-9 to A-17). The dissenting opinion suggested that the statutory antecedents of the current California statute were based on an anachronistic view of women and that there was no reason to believe that the California legislature had a different purpose in mind when it amended and recodified the unlawful sexual intercourse provision in 1970 (*id.* at A-12 to A-16 & n.2). Therefore, in the dissenters' view, the statute cannot be upheld on the pregnancy rationale proffered by the State (*id.* at A-17). The dissenting opinion further states that even if Section 261.5 were actually intended to prevent pregnancy, it is still unconstitutionally underinclusive because it fails to penalize equally culpable females.

SUMMARY OF ARGUMENT

Section 261.5 of the California Penal Code (West Supp. 1979) prohibits a male from having sexual intercourse with a female not his wife, if she is under the age of 18. However, a female who has sexual intercourse with an

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[3] The court also concluded (Pet. App. A-7 to A-8) that Section 261.5 does not denigrate a female's capacity to make intelligent choices, but rather is no different from a variety of statutes that restrict minors from engaging in certain kinds of potentially dangerous activities regardless of how well informed or intelligent the minor might be.

underage male does not violate Section 261.5, although she may well run afoul of other provisions of California's broad statutory scheme proscribing the sexual abuse and exploitation of all minors. In other words, Section 261.5 classifies on the basis of gender, protecting only young females, punishing only male sex offenders. The question presented by this case is whether that classification offends the Equal Protection Clause.

Not all laws that classify on the basis of gender are unconstitutional. To be sure, such a classification must be substantially related to the achievement of important governmental objectives. But, consistent with the Equal Protection Clause, a statute may remedy past gender discrimination. See, *e.g.*, *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 653 (1975); *Califano* v. *Webster*, 430 U.S. 313 (1977); *Kahn* v. *Shevin*, 416 U.S. 351 (1974). Or, where men and women are otherwise not similarly situated, a legislature may treat them differently on a non-invidious basis. See, *e.g.*, *Parham* v. *Hughes*, 441 U.S. 347 (1979); *Califano* v. *Webster*, *supra*; *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975).

This case involves one of what we believe is a quite small class of situations in which a legislature may justifiably differentiate between men and women. Undisputed biological facts establish that young men and young women are not similarly situated as to the problems and risks of sexual intercourse. Women alone can become pregnant, and they alone must face the physical and psychological dangers of childbearing or abortion. In addition, sexual intercourse poses serious physical problems for prepubescent females not shared by prepubescent males. Furthermore, because of their physiological differences, women and not men are the victims of forcible heterosexual rape—a problem that statutory rape provisions ameliorate. In sum, Section 261.5 provides for

the special problems of young women based on noninvidious biological distinctions between males and females.

Petitioner nonetheless contends that the sole purpose of Section 261.5 is to preserve women's chastity. But the highest court of the State has rejected this claim, holding that Section 261.5 is valid because it serves the purpose of preventing teenage pregnancies. That determination is entitled to great deference, particularly where, as here, the legislature has subsequently acquiesced in the court's ruling. Furthermore, the language of Section 261.5 and the policy and intent of the California legislature evinced in other legislation demonstrate that the prevention of pregnancy and the prevention of physical harm to female minors are the primary purposes underlying Section 261.5.

This case has an unusual aspect that distinguishes it from the vast majority of "statutory rape" cases. Here petitioner is also underage, and the question thus arises whether the statute is constitutional as applied to a defendant who is a minor. Even assuming that Section 261.5 could not constitutionally be invoked to punish only the male of an equally culpable teenage love couple, it is not clear that petitioner has standing to raise that challenge. As it now stands, the record in this case indicates that petitioner was the aggressor and that his victim did not voluntarily agree to have sexual intercourse. See, *e.g.*, *United States* v. *Raines*, 362 U.S. 17, 21 (1960). In any event, we do not believe that Section 261.5 should be held invalid even as applied to equally culpable males and females. Because men and women are not similarly situated as to the risks and dangers of sexual intercourse, a legislature could constitutionally choose to impose a sanction only on men, who would otherwise lack any substantial deterrent.

ARGUMENT

THE CALIFORNIA UNLAWFUL SEXUAL INTERCOURSE STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

This case poses the narrow question whether California's unlawful sexual intercourse statute unconstitutionally discriminates on the basis of gender. California, like a number of states, territories, and the federal government,[4] has enacted a gender-based "statutory rape" provision. See Cal. Penal Code § 261.5 (West Supp. 1979). Section 261.5 prohibits a male from having sexual intercourse with a female not his wife, if she is under the age of 18. Although a female having sexual intercourse with an underage male may well run afoul of various other California penal provisions (see pages 10-11, *infra*), she does not violate Section 261.5. Consistent with the overwhelming weight of authority,[5] the court

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[4] See 18 U.S.C. 1153, 2032; Ala. Code §§ 13-1-133, 13-1-134 (1979); C.Z. Code tit. 6, § 2221(1) (1963); Del. Code Ann. tit. 11, § 762(a) (1979); D.C. Code Ann. § 22-2801 (Supp. I 1974); Ga. Code Ann. § 26-2018 (1978); Idaho Code § 18-6101(1) (1979); La. Rev. Stat. Ann. § 14.80(1) (West Supp. 1980); N.Y. Penal Code §§ 130.25(2), 130.30, 130.35(3) (McKinney 1975); Okl. Stat. tit. 21, §§ 1111(1)-(2), 1112 (1958); Or. Rev. Stat. § 163.375 (1979); 1974 P.R. Sess. Laws, Act No. 115, Art. 99(a) (1974); Tex. Penal Code Ann. § 21.09 (Vernon Supp. 1980); Va. Code §§ 18.2-61, 18.2-63 (Supp. 1979); V.I. Code Ann. tit. 14, §§ 1702-1703 (1964 & Supp. 1978).

[5] Although this Court has never directly addressed this issue, two members of the Court have previously concluded that gender-based statutory rape provisions are clearly constitutional. See *Helgemoe* v. *Meloon*, 436 U.S. 950 (1978) (the Chief Justice and Mr. Justice Blackmun). In addition, the lower federal courts and state courts have almost uniformly concluded that such provisions are constitutional. See, *e.g.*, *Rundlett* v. *Oliver*, 607 F.2d 495 (1st Cir. 1979); *Hall* v. *McKenzie*, 537 F.2d 1232 (4th Cir. 1976); *Hall* v. *State*, 365 So.2d 1249, 1252-1253 (Ala. Crim. App. 1978), cert. denied, 365 So.2d 1253 (1979); *State* v. *Gray*, 122 Ariz. 445, 595

below concluded that a state may constitutionally limit the protection afforded by a statutory rape provision only to underage women because sexual intercourse poses serious physical problems for young women not faced by young men. We submit that the decision of the Supreme Court of California is correct.

The principal importance of this case—and our main concern—is the facial validity of this discrimination based on the gender of the underage participant in the act of sexual intercourse. This case also presents a subsidiary issue of the validity of the statute as applied, which arises by virtue of the fact (extremely unusual in these cases) that petitioner himself was also underage. We discuss this subsidiary issue in the last section of this brief (pages 24-25, *infra*).

P.2d 990, 991-992 (1979); *People* v. *Mackey*, 46 Cal. App. 3d 755, 760-761, 120 Cal. Rptr. 157, 160 (4th Dist.), cert. denied, 423 U.S. 951 (1975); *People* v. *Salinas*, 191 Colo. 171, 551 P.2d 703 (1976); *State* v. *Brothers*, 384 A.2d 402 (Del. Super. Ct. 1978); *In re W.E.P.*, 318 A.2d 286, 289-290 (D.C. 1974); *Barnes* v. *State*, 244 Ga. 302, 303-304, 260 S.E. 2d 40, 41-42 (1979); *State* v. *Drake*, 219 N.W.2d 492, 495-496 (Iowa 1974); *State* v. *Bell*, 377 So.2d 303 (La. 1979); *State* v. *Rundlett*, 391 A.2d 815 (Me. 1978); *Green* v. *State*, 270 So.2d 695 (Miss. 1972); *In re J.D.G.*, 498 S.W.2d 786, 792-793 (Mo. 1973); *State* v. *Meloon*, 116 N.H. 669, 366 A.2d 1176 (1976); *State* v. *Thompson*, 162 N.J. Super. 302, 392 A.2d 678 (1978); *People* v. *Mndange-Pfupfu*, 411 N.Y.S. 2d 1000, 97 Misc. 2d 496 (Tompkins City Ct. 1978); *State* v. *Wilson*, 296 N.C. 298, 311-313, 250 S.E.2d 621, 629-630 (1979); *Olson* v. *State*, 588 P.2d 1018 (Nev. 1979); *State* v. *Elmore*, 24 Or. App. 651, 546 P.2d 1117 (1976); *Roe* v. *State*, 584 S.W.2d 257, 259 (Tenn. Crim. App. 1979); *Ex parte Groves*, 571 S.W.2d 888, 892-893 (Tex. Crim. App. 1978); *Moore* v. *McKenzie*, 236 S.E.2d 342-343 (W.Va. 1977); *Flores* v. *State*, 69 Wisc. 2d 509, 510-511, 230 N.W.2d 637, 638 (1975). Contra, *United States* v. *Hicks*, No. 78-2534 (9th Cir. Apr. 16, 1980) (the government is currently considering whether to file a petition for a writ of certiorari in this case); *Meloon* v. *Helgemoe*, 564 F.2d 602 (1st Cir. 1977), cert. denied, 436 U.S. 950 (1978) (limited in *Rundlett* v. *Oliver*, *supra*).

Code §§ 286(b)(1) (sodomy), 288a(b)(1) (oral copulation).[7] See also Cal. Penal Code §§ 311.2(b), 311.4 (West Supp. 1977) (prohibiting child pornography and similar commercial exploitation).[8]

In sum, Section 261.5 is merely part of a broad statutory scheme designed to protect all minors in California from sexual exploitation and the risks and problems caused by sexual activities involving adolescents. Of course, unlike the other gender-neutral provisions discussed above, Section 261.5 creates an additional measure of protection solely for young females, essentially between the ages of 14 and 17.[9] The question thus posed is whether the biological differences between the sexes justify that distinction.

B. The Constitution Does Not Prohibit Gender Classifications That Are Substantially Related To The Achievement Of Important Governmental Purposes

The Court has had difficulty in agreeing upon the proper approach and analysis in gender discrimination cases.[10] Nonetheless, it is now well settled that "a State

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[7] The statutes provide for a range of penalties depending upon the ages of the child and perpetrator. See Cal. Penal Code §§ 286(b)(2) & (c), 288a(b)(2) & (c) (West Supp. 1979).

[8] Likewise, the federal criminal code prohibits the sexual exploitation of both young males and young females. See Pub. L. No. 95-225, Section 2, 92 Stat. 7 (to be codified at 18 U.S.C. 2251 *et seq.*) (child pornography prohibited); 18 U.S.C. 13, 1153 (assimilating state laws).

[9] Both males and females under the age of 14 are fully covered by Section 288, which provides for a greater penalty than does Section 261.5. Compare Cal. Penal Code § 288 (West Supp. 1979) with Cal. Penal Code §§ 264, 18 (West Supp. 1979).

[10] See *Craig* v. *Boren*, 429 U.S. 190, 210 n.* (1976) (Powell, J. concurring). These differences are manifested in the multiple opinions rendered by the Court in many of the recent equal protection cases involving gender classifications. See, *e.g.*, *Parham* v. *Hughes*, 441 U.S. 347 (1979); *Caban* v. *Mohammed*, 441 U.S. 380 (1979); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Craig* v. *Boren*, *supra*.

is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." *Parham* v. *Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion). See, *e.g.*, *Califano* v. *Westcott*, 443 U.S. 76, 89 (1979); *Craig* v. *Boren*, 429 U.S. 190, 197 (1976); *Frontiero* v. *Richardson*, 411 U.S. 677, 690 (1973). Hence, a statute may not be predicated on archaic assumptions and outdated misconceptions about the social or economic roles of the sexes. See, *e.g.*, *Wengler* v. *Druggists Mutual Insurance Co.*, No. 79-381 (Apr. 22, 1980); *Orr* v. *Orr*, 440 U.S. 268 (1979); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Stanton* v. *Stanton*, 421 U.S. 7, 14-15 (1975); *Frontiero* v. *Richardson*, *supra*. Nor may a legislature stigmatize one sex or the other. See, *e.g.*, *Caban* v. *Mohammed*, 441 U.S. 380 (1979); *Craig* v. *Boren*, *supra*; *Reed* v. *Reed*, 404 U.S. 71 (1971).

It does not follow, however, that all laws that treat one sex differently from the other are invariably invalid. So long as the gender classification in question is substantially related to the achievement of important government objectives, the legislature is free to act. See, *e.g.*, *Wengler* v. *Druggists Mutual Insurance Co.*, *supra*, slip op. 8; *Califano* v. *Westcott*, *supra*, 443 U.S. at 89; *Orr* v. *Orr*, *supra*, 440 U.S. at 279; *Califano* v. *Webster*, 430 U.S. 313, 316-317 (1977); *Craig* v. *Boren*, *supra*, 429 U.S. at 197. Accordingly, Congress or a state legislature may enact appropriately tailored provisions "to provide for the special problems of women." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 653 (1975). See *Califano* v. *Webster*, *supra*; *Kahn* v. *Shevin*, 416 U.S. 351 (1974); *Frontiero* v. *Richardson*, *supra*, 411 U.S. at 689 n.22. See also *Fullilove* v. *Klutznick*, No. 78-1001 (July 2, 1980). Moreover, the Court has repeatedly upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. See *Par-*

ham v. *Hughes*, *supra*; *Califano* v. *Webster*, *supra*; *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Kahn* v. *Shevin*, *supra*. Cf. *Geduldig* v. *Aiello*, 417 U.S. 484, 496 n.20 (1974).

Although none of the Court's plenary decisions in this area govern the unique question raised here,[11] the principles briefly outlined above compel the conclusion that Section 261.5 is constitutional. As we demonstrate below, young men and women are not similarly situated as to the risks and dangers of sexual intercourse. Accordingly, the legislature's decision to afford young women extra protection against risks that they alone face does not offend the Equal Protection Clause. See note 4, *supra*.

C. Section 261.5 Furthers Important Governmental Interests In Deterring Illegitimate Teenage Pregnancies And Preventing Injuries To Prepubescent Females

1. A state has broad authority to protect the physical, mental, and moral well-being of its youth. Because "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," "the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences." *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979) (plurality opinion). See, *e.g.*, *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52, 72-74 (1976); *Ginsberg* v. *New York*, 390 U.S. 629, 639-641 (1968).

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[11] Only *Craig* v. *Boren* concerned a criminal provision. But in that case the gender classification was based on insubstantial if not "perverse" distinctions between young men and women. See 429 U.S. at 199-204; *id.* at 212-213 & n.4 (Stevens, J., concurring). Here, in contrast, there is no dispute that, because of the different physical characteristics of men and women, sexual intercourse is more dangerous and problematic for young women than for young men.

We note that the Court has in the past summarily upheld the constitutionality of criminal provisions that afford additional protection to females. See *Buchanan* v. *State*, 480 S.W.2d 207 (Tex. Crim. App.), appeal dismissed for want of a substantial federal question, 409 U.S. 814 (1972).

Because sexual intercourse and the concomitant problems of pregnancy and abortion involve such "important affirmative choices with potentially serious consequences," the legislature may prohibit unemancipated minors from engaging in sexual intercourse, at least on a gender-neutral basis. See *Carey* v. *Population Services International*, 431 U.S. 678, 692, 702-703 (1977) (White, J., concurring); *id.* at 705-707, 709 (Powell, J., concurring); *id.* at 713 (Stevens, J., concurring); *id.* at 718 n.2 (Rehnquist, J., dissenting); *Ginsberg* v. *New York*, *supra*. Cf. *Doe* v. *Commonwealth's Attorney*, 425 U.S 901 (1976).[12]

As the court below concluded (Pet. App. A-2 to A-5), young men and young women are not similarly situated with regard to the problems and risks of sexual intercourse. See *Planned Parenthood of Missouri* v. *Danforth*, *supra*, 428 U.S. at 71. Only women can become pregnant, and the problems for young women associated with illegitimate teenage pregnancies are enormous. In 1978, more than 220,000 live births occurred to unmarried females under 18 years of age. National Center for Health Statistics (HEW), *Advance Report: Final Natality Statistics 1977*, 27 Monthly Vital Statistics Report No. 11, Table 2 (Supp. Feb. 5, 1979); Alan Guttmacher Institute, *11 Million Teenagers* 11 (1976). See also

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[12] We do not understand petitioner to contend otherwise. But cf. Br. 22-23. We further note that the assumption that minors need protection from themselves appears grounded in reality. See Zelnick & Kantner, *Sexual And Contraceptive Experience of Young Unmarried Women In The United States, 1976 and 1971*, 8 Family Planning Perspectives 58-68 (1977); Zabin, Kantner & Zelnick, *The Risk Of Adolescent Pregnancy In The First Months of Intercourse*, 11 Family Planning Perspectives 215 (1979); Edwards, Steinman, Arnold & Hakanson, *Adolescent Pregnancy Prevention Services In High School Clinics*, 12 Family Planning Perspectives 6 (1980). While the nation's birthrate has been declining, and despite the availability of contraceptives and sex education, pregnancy rates for young women are increasing. See Alan Guttmacher Institute, *11 Million Teenagers* 12 (1976); see generally C. Chilman, *Adolescent Sexuality In A Changing American Society* (NIH Pub. No. 80-1426, 1980).

Pub. L. No. 95-626, Section 601, 92 Stat. 3595 (to be codified at 42 U.S.C. 300a-21). Moreover, teenage women, who are more likely to delay seeking an abortion until the second trimester, when the physical risks are greater, are involved in approximately one third of all abortions nationwide. See Fielding, *Adolescent Pregnancy Revisited*, 299 New England J. of Med. 893 (1973); *11 Million Teenagers, supra*, at 10. And the mortality rates and other health risks for both mother and child are greatly increased where teenage mothers are concerned. See, *e.g.*, Bennett & Bardon, *The Effects Of a School Program On Teenage Mothers And Their Children*, 47 Am. J. of Orthopsychiatry 671 (1977); *Adolescent Pregnancy Revisited, supra*, 299 New England J. of Med. at 894; *11 Million Teenagers, supra*, at 23; F. Nye, *School-Age Parenthood* 4 (Wash. State U. Extension Bull. No. 667, 1977).[13]

Likewise, there are equally dramatic biological distinctions between prepubescent males and females. Very young males may be physiologically incapable of sexual intercourse,[14] and the act of coitus does not, in any event, pose serious physical risks for sexually immature males. In contrast, because of their anatomical structure, young females may engage in sexual intercourse regardless of

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[13] In addition to the physical aspects of pregnancy and/or abortion that young women alone must face, they also suffer substantial social costs not generally suffered by young men. Empirical data demonstrate that most young pregnant girls fail to complete high school and accordingly are thereafter disadvantaged economically. See, *e.g.*, Phipps-Yonas, *Teenage Pregnancy and Motherhood*, 50 Am.J. of Orthopsychiatry 403, 414 (1980); Moore, *Teenage Childbirth and Welfare Dependency*, 10 Family Planning Perspectives 233-235 (1978); *11 Million Teenagers, supra*, at 5. As a result of these and other traumas associated with early motherhood, suicide rates for teenage mothers are seven times greater than the rate applicable to teenage girls without children. *School-Age Parenthood, supra*, at 8 (nine percent of teenage mothers attempt suicide).

[14] To be sure, young males are in need of protection from other forms of sexual exploitation, but California provides such protection. See pages 10-11, *supra*.

their age or size. Furthermore, such activity often produces serious gynecological injuries for sexually immature females, including increased risk of cervical cancer. See, *e.g.*, *Barnes* v. *State*, 244 Ga. 302, 260 S.E.2d 40, 42 (1979); Orr & Prieto, *Emergency Management of Sexually Abused Children*, 133 Am. J. of Diseases of Children 630 (1979); Jaffe, Dynneson & ten Bensel, *Sexual Abuse of Children*, 129 Am. J. of Diseases of Children 689, 690-691 (1975); C. Chilman, *Adolescent Sexuality In A Changing American Society* 146 (NIH Pub. No. 80-1426, 1980).[15] In short, sexual intercourse poses substantial physical risks for prepubescent females not faced by their male counterparts. See also Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis For Equal Rights For Women*, 80 Yale L.J. 871, 957-961 (1971).[16]

Furthermore, petitioner ignores the fact that carnal knowledge statutes serve to facilitate the prosecution of forcible rapes involving young victims.[17] Prosecutions for rape result in a far lower proportion of convictions than those for any other violent crime, regardless of the age of the victim. See K. Williams, *The Prosecution Of*

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[15] Likewise, deep psychological effects often accompany early sexual intercourse. S. Brownmiller, *Against Our Will* 279 (1975); E. Hilberman, *The Rape Victim* 50-51 (1976); Kempe, *Sexual Abuse, Another Hidden Pediatric Problem*, 62 Pediatrics 382, 386 (1978).

[16] As discussed above, Section 261.5 essentially focuses on women aged 14 to 17. See page 11, *supra*. Insofar as persons in that age group may be prepubescent and insofar as Section 261.5 is viewed in isolation from the other provisions of the California Penal Code, the distinctions between prepubescent males and females are pertinent.

[17] Almost one-third of the victims of forcible rapes are under 18 years of age and approximately 20 percent are less than 12 years of age. See R. Geiser, *Hidden Victims* 20 (1979); K. Williams, *The Prosecution Of Sexual Assaults* 6-7 (Inst. for Law and Social Research Pub. No. 7, 1978); National Inst. of Law Enforcement and Crim. Justice, U.S. Dept. of Justice, *Forcible Rape: Final Project Report* 17 (1978).

Sexual Assaults 26 (Inst. for Law and Social Research Pub. No. 7, 1978). The difficulties in proving forcible rape, including proof of lack of consent, are compounded where the victim is a young child, particularly since in many instances child rape will involve various forms of psychological pressure and trickery as well as outright violence. See, *e.g.*, R. Geiser, *Hidden Victims* 34-35 (1979); S. Brownmiller, *Against Our Will* 278 (1975).[18] Moreover, it is evident that the potential trauma for the prosecutrix in a forcible rape case, where consent is often a critical issue and where the character and sexual history of the prosecutrix is often material to the case, far exceeds that attendant upon trial of a statutory rape charge. And again, young men and young women simply are not similarly situated as to problem of forcible rape because of their immutable biological differences. See Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1, 48-49 (1977).

In sum, even assuming that females engage underage males in sexual intercourse as often as males have sexual intercourse with underage females,[19] girls face serious

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[18] The majority of reported decisions in statutory rape cases, like the preliminary hearing evidence in this case, show that intercourse was achieved by use of some form of force or threats. See, *e.g.*, *United States* v. *Sangrey*, 586 F.2d 1312 (9th Cir. 1978); *Hall* v. *State*, *supra*; *Barnes* v. *State*, *supra*; *In re Interest of J.D.G.*, *supra*; *State* v. *Drake*, *supra*. But where, as here, the evidence also shows that the victim had voluntarily drunk with petitioner and engaged in moderate sexual activity with him, it is extremely difficult to obtain a conviction for forcible rape even though the defendant's conduct may clearly violate the rape statutes. See K. Williams, *The Prosecution of Sexual Assaults*, *supra*, at 31-33.

[19] See *Caban* v. *Mohammed*, *supra*, 441 U.S. at 404 n.8 (Stevens, J., dissenting). In fact, however, the empirical evidence overwhelmingly demonstrates that sexual assaults on young females are a far greater problem than sexual assaults on young males. See, *e.g.*, *State* v. *Craig*, 169 Mont. 150, 545 P.2d 649, 653 (1976); *Emergency Management of Sexually Abused Children*, *supra*, 133 Am. J. of Diseases of Children 629-630; *Sexual Abuse of Children*, *supra*, 129 Am. J. of Diseases of Children 690; *The Prosecution of*

risks and dangers that boys do not. As the result of indisputable biological differences, females and males are therefore "*not* similarly situated" with regard to the problems of adolescent sexual intercourse, which Section 261.5 is designed to prevent. See, *e.g.*, *Schlesinger* v. *Ballard*, *supra*, 419 U.S. at 508; *Parham* v. *Hughes*, *supra*, 441 U.S. at 354. Because the additional protections afforded only to women by a criminal statute like Section 261.5 thus "provide for the special problems of women" (*Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 653), gender-based carnal knowledge provisions do not violate the Equal Protection Clause. See, *e.g.*, *Buchanan* v. *Texas*, 480 S.W.2d 207 (Crim. App. Tex.), dismissed for want of substantial federal question, 409 U.S. 814 (1972); *Rundlett* v. *Oliver*, 607 F.2d 495, 498-502 (1st Cir. 1979); *State* v. *Gray*, 122 Ariz. 445, 595 P.2d 990, 991-992 (1979); *Barnes* v. *State*, *supra*; *State* v. *Rundlett*, 391 A.2d 815 (Me. 1978). See also note 4, *supra*.

2. Petitioner concedes (Br. 20) that "the prevention of teenage pregnancy is a compelling interest in every state." He contends, however, that the purpose of the statute is not to prevent pregnancies or other injuries to young females but rather to protect "female chastity" and "the virtue of young women" (Br. 8-10, 24-27). In addition, he argues (Br. 18-24) that even if the statute were intended to prevent pregnancy, it is impermissibly

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Sexual Assaults, *supra*, at 6-7; Sarafino, *An Estimate of Nationwide Incidence of Sexual Offenses Against Children*, LVIII Child Welfare 127, 131 (1979). Furthermore, the data strongly indicate that virtually all attacks on young men involve sodomy or other acts by male aggressors—a problem simply not addressed by a gender-neutral carnal knowledge provision. See, *e.g.*, *Hidden Victims*, *supra*, at 14, 23, 75. And "[e]ven in this context, the well-established concept that a legislature may take one step at a time to remedy only part of a broader problem is not without relevance. See *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955)." *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980) (plurality opinion).

overinclusive because it covers various acts of adolescent sexual intercourse that may not result in pregnancy. We address these claims in turn.

a. Petitioner argues that the "true" purpose of Section 261.5 is to ensure the chastity of young women. But "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968). See also *Harris* v. *McCrae*, No. 79-1268 (June 30, 1980), slip op. 19-20; *Stephenson* v. *Binford*, 287 U.S. 251, 276 (1932). For example, in *Kahn* v. *Shevin*, *supra*, the Court readily assumed that a Florida tax provision first enacted in 1885 was not based on romantic paternalism but was appropriately designed to ameliorate the past effects of gender-discrimination—a virtually nonexistent concept in 1885. See *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 223-224 (Stevens, J., concurring). Cf. *Craig* v. *Boren*, *supra*, 429 U.S. at 199-200 & n.7. And whatever may be the limits on this principle of deference to the legislative process (see also *Fullilove* v. *Klutznick*, *supra*, slip op. 20-21), here the highest court of the state has concluded that the prevention of pregnancy is a compelling governmental interest that supports Section 261.5 (Pet. App. A-2 to A-4). That determination is entitled to great deference, and should be rejected, if at all, only if an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation. See, *e.g.*, *Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 648 n.16; *Reitman* v. *Mulkey*, 387 U.S. 369, 373-374 (1967); *McGowan* v. *Maryland*, 366 U.S. 420, 449 (1961); cf. *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979).[20] Petitioner's argument falls far short of the mark.

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[20] As petitioner points out (Pet. 9) the California Supreme Court long ago suggested that an "obvious purpose" of a predecessor statute to Section 261.5 was the "protection of society by protecting the virtue of young and unsophisticated girls * * *," as well as the

First, we note that the language of the statute is wholly inconsistent with petitioner's claim. If female chastity were the sole concern of the California legislature, then California would have included a defense based on the unchaste state of the underage female, as several other states have done.[21] The California legislature has refused to provide such a defense despite a judicial suggestion to do so (see *People* v. *Hernandez*, 61 Cal. 2d 529, 531-532 & n.1, 393 P.2d 673, 674-675 & n.1 (1964)), 39 Cal. Rptr. 361, 362-363 & n.1, and it is therefore apparent that teenage pregnancy and other problems rather than chastity are the concerns of Section 261.5. See *State* v. *Rundlett*, *supra*, 391 A.2d at 820 "[t]he objective of the Maine and Massachusetts lawmaking bodies to prevent pregnancy in young females through their statutory rape laws is manifested by the refusal of both states to follow the lead of other jurisdictions in making the prior chasity of the prosecutrix an element of the offense." [22]

Furthermore, petitioner's contention regarding the purpose of Section 261.5 is premised on the unreasonable

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"prevention of * * * the principal act [*i.e.*, sexual intercourse]," quoting *People* v. *Verdegreen*, 106 Cal. 211, 214, 39 P. 607, 608-609 (1895). Such mixed motivations would not render the act invalid. See *United States* v. *O'Brien*, *supra*; *Stephenson* v. *Binford*, *supra*. More important, the critical question here is not the purpose of an earlier version of the act, but the legislature's purpose in amending the act on several subsequent occasions, including 1970. See *McGowan* v. *Maryland*, 366 U.S. 420, 431, 446-449 (1961). And as to that question, "the relevant pronouncements of the [California Supreme Court] dispel any argument that the statute['s] announced purpose is [the preservation of female chastity]." *Id.* at 449.

[21] See, *e.g.*, Fla. Stat. §§ 794.011, 794.05 (1976 & Supp. 1979); Miss. Code Ann. §§ 97-3-65, 97-3-67 (1972).

[22] The federal carnal knowledge statutes also do not provide a defense based on lack of chastity. See 18 U.S.C. 1153, 2032. The legislative history of those provisions, albeit sparse, demonstrates that Congress sought to protect young females from the dangers of sexual intercourse regardless of their chastity. See 19 Cong. Rec. 6501 (1888); 20 Cong. Rec. 997 (1889).

and unsubstantiated assumption that the California legislature, in amending and recodifying its unlawful intercourse statute in 1970,[23] was motivated solely by discredited nineteenth century ideas and was entirely unconcerned with the problems of child abuse and teenage pregnancies. Compare *Kahn* v. *Shevin*, *supra*. To the contrary, however, even prior to 1970, the legislature had expressly recognized that rape, including statutory rape, causes unwanted pregnancies, and it therefore provided that physicians in California may perform abortions on rape and incest victims. See Cal. Health and Safety Code §§ 25951-25952 (West Supp. 1980) (codifying 1967 Cal. Stats. ch. 327, § 1).[24] See also Cal. Welfare & Inst. Code § 16145 (West Supp. 1979) ("The legislature finds that pregnancy among unmarried persons under 21 years of age constitutes an increasing social problem in the State of California"); Cal. Civil Code §§ 34.5-34.9 (West Supp. 1980) (unemancipated minors do not need parental consent for medical treatment regarding pregnancy and rape); Cal. Welfare and Inst. Code § 14503 (West Supp. 1980) (family planning services available to all persons regardless of age or marital status).[25] Finally, subsequent to the decision below, the California legislature considered and rejected proposals to render Section 261.5 gender-neutral, thereby implicitly ratifying the judgment of the California Supreme Court. Cal. Assembly Bill No. 1588, 1979-1980 Cal. Reg. Legis. Sess. (1980); Cal. Sen. Bill

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[23] 1970 Cal. Stats. ch. 1301, § 2; Pet. App. A-16 n.2.

[24] A statutory rape victim under the age of 15 is entitled to such an abortion on demand without reference to the procedures normally entailed in the abortion process in California. See Cal. Health and Safety Code § 25952(c) (West Supp. 1980); Leavy & Charles, *Therapeutic Abortion Act: An Analysis and Guide to Medical and Legal Procedure*, 15 U.C.L.A. L. Rev. 1, 12-22 (1967).

[25] These declarations of California policy illuminate the purpose of Section 261.5. See *Fullilove* v. *Klutznick*, *supra*, slip op. 7-8 (Powell, J., concurring); *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, No. 78-1651 (Feb. 20, 1980).

No. 2045, 1979-1980 Cal. Reg. Legis. Sess. (1980). See, *e.g.*, *Board of Education* v. *Harris*, 444 U.S. 130, 148-149 (1979); *People* v. *Hallner*, 43 Cal. 2d 715, 719, 277 P.2d 393, 396 (1954).[26]

b. Petitioner further claims (Br. 24) that "Section 261.5 is colossally overinclusive." In particular, he argues that the statute is overbroad insofar as it covers prepubescent females, who are, by definition, incapable of becoming pregnant. But even assuming that petitioner has standing to challenge the breadth of Section 261.5,[27] there is no merit to petitioner's claim. We have already demonstrated that prepubescent males and females are not similarly situated with regard to the risks of sexual

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[26] We are aware of no relevant legislative history regarding Section 261.5. A state legislature need not, of course, compile "the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove* v. *Klutznick*, *supra*, slip op. 26. See also *id.* at 7-8 (Powell, J., concurring); *id.* at 4 n.4 (Marshall, J., concurring). Moreover, the dearth of legislative history is hardly surprising. Section 261.5 is a state criminal provision with ancient origins (see Statute of Westminster I, 1275, 3 Edw. 1, c.13 (1 Stat. 83)) that is designed to prevent obvious problems for young women arising out of sexual intercourse.

Petitioner nonetheless claims that because the original version of Section 261.5 applied only to girls under 10, the statute was obviously intended to protect chastity and not to prevent pregnancies (Pet. App. A-18). That fact, however, strongly suggests that the original statute was intended to protect prepubescent females from physical harms not suffered by young males. See pages 15-16, *supra*. In any event, the relevant question is the legislature's purpose in increasing the age limit of the statute so that, by 1970, it effectively covered only females between the ages of 14 and 17.

[27] There is no allegation that Sharon, who was 16 at the time of the incident, was prepubescent or otherwise infertile at that time. It is therefore doubtful whether petitioner can challenge the statute because it might be unconstitutional as applied to another victim. See *United States* v. *Raines*, 362 U.S. 17, 21 (1960); *United States* v. *Green*, 554 F.2d 372, 375 (9th Cir. 1977); *United States* v. *Garrett*, 521 F.2d 444, 446 (8th Cir. 1975).

intercourse. Thus, the statute constitutionally extends protection only to young females based on their greater physical needs. Moreover, since Section 288 of the California Penal Code prohibits any lewd or lascivious act involving any minor under the age of 14, the effective scope of Section 261.5 is females between the ages of 14 and 17. See pages 11, 16 n.16, *supra*. Because the overwhelming majority of females in that age group are capable of childbirth, Section 261.5 is substantially related to the prevention of illegitimate teenage pregnancies.

Petitioner also erroneously contends (Br. 18-19) that the statute is unconstitutional because it does not provide for a defense based on the use of contraceptives. This claim is not related to gender at all. Rather, as petitioner himself recognizes (Br. 19), his allegation is that the statute is irrational insofar as it treats males who use contraceptives the same as it treats "irresponsible" males.[28] Such a claim would be equally applicable to a gender-neutral statute, and it therefore is properly evaluated under the "mere rationality" standard and not the "substantial relationship" standard applied in gender discrimination cases. Cf. *Harris* v. *McRae*, *supra*, slip op. 22-24. And there can be no question that the omission of a contraceptives defense from the unlawful sexual intercourse statute is not wholly irrational.

In fact, even adjudged under the more exacting standard, it is apparent that the lack of a "contraceptives" defense does not render Section 261.5 invalid. See *Kahn* v. *Shevin*, *supra*, 416 U.S. at 356 n.10. Such a defense would entail impossible problems of proof in an area already fraught with prosecutorial difficulties. See generally K. Williams, *The Prosecution of Sexual Assaults*, *supra*; Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977). Furthermore, as the court below correctly pointed out (Pet. App. A-6), no contraceptive is completely failsafe.

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[28] Petitioner does not allege that he used a contraceptive.

record does not presently indicate the applicability of that description to petitioner himself, petitioner's claim is at a minimum, premature. See, *e.g.*, *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 380 (1977); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973); *United States* v. *Raines*, 362 U.S. 17, 21 (1960); *United States* v. *Green*, 554 F.2d 372, 375 (9th Cir. 1977); *United States* v. *Garrett*, 521 F.2d 444, 446 (8th Cir. 1975).[30]

In any event, Section 261.5 is not unconstitutional even if it is viewed as imposing greater sanctions on underage males than on underage females.[31] Men and women are not similarly situated as to the risks and problems of sexual intercourse. The risks of pregnancy and attendant problems themselves constitute a substantial deterrence to young females. No similar natural sanctions deter young males, and the available evidence indicates that the abolescent male generally disregards the risk of pregnancy. See, *e.g.*, Phipps-Yonas, *Teenage Pregnancy and Motherhood*, *supra*, 50 Am. J. of Orthopsychiatry at 412. Accordingly, the legislature could constitutionally provide that only males need be punished and that females, who ordinarily are in fact the victims in carnal knowledge prosecutions, need not.

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[30] Indeed, difficulty of discovery of the offense and the normal exercise of prosecutorial discretion make it unlikely that there will be many prosecutions of the male partner in a teenage love couple. For this reason, it seems unnecessary for this Court to concern itself now with the proper disposition of such a hypothetical case.

[31] An underage female who is either more culpable than or equally culpable with her male lover may be prosecuted as a juvenile delinquent. Cal. Welfare and Inst. Code § 602 (West 1972 & Supp. 1980); see *In re Gladys R.*, 1 Cal.3d 855, 867-869, 464 P.2d 127, 136-138, 83 Cal. Rptr. 671, 680-682 (1970).

CONCLUSION

The judgment of the Supreme Court of California should be affirmed.

Respectfully submitted.

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SEPTEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 327374 80

Supreme Court, U.S.
FILED
JUL 30 1980
MICHAEL RODAK, JR., CLERK

79-1344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF CALIFORNIA

BRIEF OF WOMEN'S LEGAL DEFENSE FUND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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July, 1980

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STATEMENT OF INTEREST

Pursuant to Supreme Court Rule 42(2), the Women's Legal Defense Fund submits this brief as *amicus curiae* in support of the petitioner. This brief is filed with the written consent of both parties; the letters of consent have been filed with the Clerk. The interest of this *amicus* is as follows. The Women's Legal Defense Fund was founded in 1971 as a non-profit organization dedicated to the elimination of discrimination on the basis of sex. This *amicus* is committed to the eradication of gender-based discrimina-

tion against either sex, whether it appears in the area of employment or, as here, in the criminal law. *Amicus* has examined the issue presented in this case from the perspective of its commitment to equal treatment of both sexes, and it believes that the decision in this case will have a significant impact on the problem of differential treatment of sexes generally and on sex discrimination in the criminal law particularly.

QUESTION PRESENTED

Whether California Penal Code Sec. 261.5, which permits the criminal prosecution of a minor male for engaging in consensual sexual intercourse with a minor female while the minor female is not liable for prosecution under the statute, violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

Amicus' argument to this Court is simple: because California Penal Code Sec. 261.5 makes the criminality of an act of consensual sexual intercourse between minors [1] dependent solely on the sex of the male participant, even though the act is, perforce, committed by minors of both sexes, the statute creates a classification by gender that is not fairly and substantially related to important governmental objectives and is thus violative of the Equal Protection Clause of the Fourteenth Amendment.

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[1] *Amicus* recognizes that, on its face, California Penal Code Sec. 261.5 applies to acts of forcible as well as consensual intercourse, and that it also applies, on its face, to acts of intercourse between minor females and adult males. Although our argument is restricted to the factual setting of the case now before the Court, *viz.*, an act of consensual intercourse between minors, we do not mean thereby to imply that we believe the statute to be unconstitutional *only* as applied to consensual acts between minors. Rather, this *amicus* agrees with and adopts the arguments of *amicus* American Civil Liberties Union with respect to the unconstitutionality of the statute as it reaches facts other than those presented by this case.

ARGUMENT

The Gender-Based Distinction In California Penal Code Sec. 261.5 Is Not Fairly And Substantially Related To Important Governmental Objectives.

This case concerns the constitutionality of a statute that makes it a crime for a minor male to have consensual sexual intercourse with a minor female but does not permit the prosecution of a minor female for the same offense.

In order to meet the requirements of the Equal Protection clause, gender-based statutory distinctions must serve important governmental objectives and must be fairly and substantially related to the achievement of those objectives. *Caban* v. *Mohammed,* 441 U.S. 380 (1979); *Craig* v. *Boren,* 429 U.S. 190 (1976); *Reed* v. *Reed,* 404 U.S. 71 (1971). Thus, the question here is whether the distinction between minor males and females embodied in California Penal Code Sec. 261.5 bears any substantial relation to important governmental interests. In our view, it does not.

Three objectives are ordinarily advanced as the *raison de etre* of statutory rape laws: first, preservation of the chastity of minor females; second, protection of minor females from adverse psychic or physical consequences resulting from sexual intercourse; and third, prevention of pregnancy among minor females.[2] Upon analysis, however, it is apparent that none of those objectives are substantially advanced by gender-discriminatory statutes like California Penal Code Sec. 261.5.

The first two purported objectives—preservation of chastity and protection from the adverse consequences of sexual

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[2] *See* Di Gennaro, *Statutory Rape Law in California: Unequal Protection of the Minor Male,* 2 CRIM. JUSTICE J. 239, 242-247 (1979); Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard,* 62 YALE L. J. 55, 75-78 (1952).

intercourse—reflect the very questionable assumption that minor females are incapable of making intelligent and informed decisions about sexual matters. In other contexts, this Court has rejected similar arguments and has recognized the capacity of minor females to make such decisions for themselves. *Bellotti* v. *Baird*, —— U.S. —— (1979) (minor females may well have the maturity to decide to abort an unwanted pregnancy independent of their parents' wishes); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976) (a state may not impose a blanket provision requiring the consent of a parent or a person *in loco parentis* as a condition for abortion for an unmarried female minor during the first twelve weeks of her pregnancy); *Carey* v. *Population Services International*, 431 U.S. 678 (1977) (a state may not prohibit the sale or distribution of contraceptives to minors).[3] The notion underlying California Penal Code Sec. 261.5—that because young women are incapable of making informed decisions to engage in sexual intercourse it is appropriate to shield them from the consequences of their folly, while at the same time criminal sanctions may legitimately be imposed on young men because they, by contrast, are sufficiently competent to make such decisions—is simply another remnant of what this Court has called "romantic paternalism." *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973). And in any event, it is self-evident that a statute which authorizes criminal punishment of minor males while allowing females to engage freely in sexual activity without prosecution is not even rationally, much less fairly

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[3] The proposition that minor females can and do make intelligent decisions on sexual questions is supported by the empirical findings of social scientists. *See, e.g.*, Zelnik & Kantner, *Sexual and Contraceptive Experience of Young Unmarried Women in the United States, 1976 and 1971*, 9 FAMILY PLANNING J. 55 (1971).

[4] This was the only rationale relied upon by the Supreme Court of California in sustaining the constitutionality of California Penal Code Sec. 261.5.

and substantially, related to the goals of preserving chastity and protecting young women from harm.

Likewise, the prevention of pregnancy objective [4] is clearly not substantially served by a statute that criminally penalizes only the potential father for a consensual act of intercourse where the undesirable result—pregnancy—is patently the responsibility of the female as well as the male participant in the act. Cf. *Meloon* v. *Helgmoe*, 564 F.2d 602, 608, n. 7 (1st Cir. 1977), *cert. denied*, 436 U.S. 950.[5] Indeed, the fact that under California law only penetration and not emission is necessary to complete the crime thoroughly discredits the argument that California Penal Code Sec. 261.5 substantially serves the goal of pregnancy prevention.[6]

Because the gender-classification contained in California Penal Code Sec. 261.5 is not fairly and substantially related to important governmental objectives, the statute plainly denies equal protection of the laws to minor males.

CONCLUSION

For the foregoing reasons, *amicus* Women's Legal Defense Fund urges this Court to reverse the decision of the Supreme Court of California.

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[5] *See also* decisions of state appellate courts rejecting the pregnancy prevention rationale with respect to statutes which penalize only the male participant in consensual acts, e.g., *Purvis* v. *State*, 377 So. 2d 674 (Fla. 1979); *Commonwealth* v. *MacKenzie*, 334 N.E. 2d 613 (Mass. 1975).

[6] California Penal Code Sec. 263.